No. 88-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

M. M. WINTER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9738
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether a person can file a petition to reopen a final decision with the Interstate Commerce Commission, and at the same time maintain a petition to review such decision under 28 U.S.C. 2342(5), 2344; or whether the petition to reopen renders the decision nonfinal, such that the court of appeals properly dismissed the petition for review for want of a final decision.

II. Assuming a nonfinal decision of the Interstate Commerce Commission, whether such decision is nevertheless judicially reviewable, and to what extent.

LIST OF PARTIES

The following parties appeared in the proceedings before the Court of Appeals below:

M.M. Winter (United Transportation Union)
Interstate Commerce Commission
United States of America
Railway Labor Executives' Association
Burlington Northern Railroad Company
Winona Bridge Railway Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, M.M. Winter,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-18a) is not yet reported. The decision of the Interstate Commerce Commission (App. C, 20a-29a) is not reported.

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[1]General Chairman of the United Transportation Union for Burlington Northern Railroad Company (former Great Northern and SP&S lines).

JURISDICTION

The opinion of the court of appeals (App. A, 1a-18a) was entered on July 12, 1988. The order of the court of appeals dismissing the appeal for want of a final agency order (App. B, 19a) was entered on May 13, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2101(c) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10327, 10505, and 11343, the Administrative Procedure Act, 5 U.S.C. 704, and the Judicial Code, 28 U.S.C. 2344, are set forth at App. E, 38a-40a.

STATEMENT OF THE CASE

1. Under 28 U.S.C. 2344, the U.S. Court of Appeals acquires jurisdicition to review final orders of the Interstate Commerce Commission. An order of the Commission is final on the date on which it is served, and an action may be filed after that date. 49 U.S.C. 10327(i). However, orders of the Commission also are subject to petitions to reopen, on the ground of material error, new evidence, or substantially changed circumstances, 49 U.S.C. 10327(g)(1), and the Commission has issued regulations governing the filing of petitions to reopen orders entered by the entire Commission. 49 CFR 1115.3 (1987 ed.). It frequently occurs that a party to a Commission proceeding will file a petition with a court of appeals to review a Commission decision, either prior or subsequent to the filing of a petition with the agency itself to reopen the very same Commission decision; indeed, the Commission's regula-

tions contemplate pursuit of both avenues for relief simultaneously. 49 CFR 1115.6 (1987 ed.) Moreover, one court of appeals has warned counsel to seek judicial review of a final agency order while also requesting further agency consideration, at the risk of having judicial review time-barred. *Eagle-Pitcher Industries v. United States E.P.A.*, 759 F.2d 905 (D.C. Cir. 1985). This Court last year emphasized the necessity for a timely filing of a petition to review Commission orders. *I.C.C.* v. *Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360 (1987).

2. This petition for certiorari embraces an opinion by a divided panel of the U.S. Court of Appeals for the Eighth Circuit, which held that a Commission order final for purposes of judicial review, nevertheless became nonfinal after the petitioner filed his petition with the Commission to reopen the same decision. Thus, the petition to review was dismissed for want of a final order, the majority's dismissal purportedly based upon *Brotherhood of Locomotive Engineers, supra*. (App. A, 12a):

> An agency decision may thus be final for one purpose yet nonfinal for another purpose. However, no cases hold that the same party may simultaneously seek both judicial and administrative review. We are convinced that under the circumstances of this case *Brotherhood of Locomotive Engineers* stands for the proposition that once the unions filed petitions to reopen and revoke the exemption, the original *January 7 Decision* became nonfinal.

After determining the Commission's decision had been rendered nonfinal, the majority considered whether the agency's action was yet reviewable under other accepted principles, and concluded it was not. The majority opinion analogized the

situation with judicial review of agency decisions not to reject utility rate filings pending investigation into the reasonableness of the rates, citing *Papago Tribal Util. Auth.* v. *Federal Energy*, 625 F.2d 235 (D.C. Cir. 1980), *cert. den.*, 449 U.S. 1061. (App. A, 12a-14a). The majority stated it was bound by the statutory scheme of the Staggers Act, which it found provides for challenges to the Commisison's actions through revocation proceedings after the transaction has been consummated. (App. A, 14a, 16a).

3. The specific controversy involves a notice filed by Winona Bridge Railway Company (Winona Bridge) with the Commission that it would commence train operations by trackage rights over the 1,860-mile line of Burlington Northern Railroad Company (BN) between Winona Junction, WI, and Seattle, WN. (App. C, 20a). Winona Bridge is a wholly-owned subsidiary of BN. (App. A, 2a). Winona Bridge is nothing more than a defunct railroad bridge over the Mississippi River between Winona, MN and East Winona, WI, which has been out of service since September, 1985. (App. A, 2a, 17a). The purpose behind the proposed Winona Bridge trackage rights operation would be to transport BN freight traffic with employees not subject to BN's labor agreements. (App. A, p. 3a).

Winona Bridge's notice was filed pursuant to the Commission's class exemption for trackage rights by which one rail carrier operates over the line of another rail carrier. *Railroad Consolidation Procedures*, 1 I.C.C. 2d 270 (1985), *aff'd sub nom. Illinois Commerce Com'n* v. *I.C.C.*, 819 F.2d 311 (D.C. Cir. 1987). *See:* 49 CFR 1180.2(d)(7) and 1180.4(g).

Petitioner Winter, an official of the United Transportation Union, asked the Commission to reject Winona Bridge's notice on the ground Winona Bridge is not a "rail carrier," so as

to invoke the trackage rights provisions of 49 U.S.C. 11343 (a)6) upon which the trackage rights class exemption is based.[2]

The provisions of 49 U.S.C. 11343(a)(6) require that the recipient of trackage rights be a "rail carrier." Cf. *County of Marin* v. *United States*, 356 U.S. 412, 418 (1958). A "rail carrier" means a person providing rail transportation for compensation. 49 U.S.C. 10102(20). Clearly, Winona Bridge being merely an out-of-service and non-functioning bridge, does not qualify as a rail carrier.

However, the Commission on January 7, 1988, by a divided 3-to-2 vote, denied petitions to reject Winona Bridge's notice. (App. C, 20a-29a). Winter and Railway Labor Executives' Association (RLEA) on January 19 and 27, 1988, respectively, petitioned the Commission to reopen its January 7, 1988 decision. (App. A, 2a). Shortly thereafter, on February 17, 1988, Winter filed his petition for review of the January 7, 1988 decision in the court of appeals, and RLEA was permitted to intervene.[3] The Commission on March 7, 1988, denied Winter's petition for a stay pending judicial review, again by a divided 3-to-2 vote. (App. D, 30a-37a).

The court of appeals granted a stay, and established expedited briefing and argument. The court of appeals on May 13, 1988, by a divided two-to-one vote, concluded to vacate the stay and to dismiss the petition for review for want of a final Commission order. (App. B, 19a). Likewise the court of

[2]The opinion states petitioner Winter acknowledged that previous Commission cases referred to Winona Bridge as a carrier. (App. A, 7a). This is not correct. Only one Commission decision was cited as listing Winona Bridge in the past to be a "carrier," which was BN's error. *Burlington Northern Inc.,-Control & Merger*, 360 I.C.C. 788, 798 (1980). See subsequent report, 366 I.C.C. 862-872 (1983).

[3]BN and Winona Bridge intervened on behalf of respondents Commission and United States of America (App. A, 2a n.3).

appeals decided not to exercise any powers under the All Writs Act, 28 U.S.C. 1651. (App. A, 2a, 16a).[4]

The court of appeals ruled that the January 7, 1988 Commission Decision became nonfinal when Winter and RLEA filed their petitions to reopen the January 7, 1988 Decision. The court's reasoning was based upon its reading of *I.C.C.* v. *Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, with particular reference to the language and citations at page 2369, that petitions for reconsideration render the orders under reconsideration nonfinal. 107 S. Ct. at 2369:

> The same argument could be made, however, with respect to a similar provision of the Administrative Procedure Act, 5 U.S.C. 704, which reads in relevant part: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section (entitled "Actions Reviewable") whether or not there has been presented or determined an application for. . . any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." That language has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute — see *e.g.*,

[4]The opinion suggests petitioner sought the writ to compel the Commission to reject Winona Bridge's notice. (App. A, 2a, 16a, 17a). This is incorrect. Petitioner sought a writ to stay the operation of Winona Bridge's trackage rights notice pending completion of the administrative proceedings, in the event the court either affirmed the Commission's January 7, 1988 Decision or deferred ruling until the agency had acted upon petitions to reopen or to revoke. (Pet. Br. 29-30). Cf. *American Public Gas Ass'n v. Federal Power Commission*, 543 F.2d 356, 358 (D.C. Cir. 1976). *Sheehan* v. *Purolator Courier Corp.*, 676 F.2d 877, 883-85 (2d Cir. 1981).

> 15 U.S.C. 717r, 3416(a)), but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal. See *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 541 (1970) (dictum); *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 326-327 (1961) (dictum); *id.*, at 339-343 (Whittaker, J., dissenting); *Outland* v. *CAB*. 284 F.2d 224, 227 (1960).

The court of appeals emphasized the cited language from *Outland, American Farm Lines,* and *Delta.* (App. A, 11a-12). The court of appeals stated that a party could not seek both administrative and judicial relief at the same time. (App. A, 12a):

> Winter correctly notes that in multi-party proceedings one party may seek judicial review of an agency decision while another party seeks administrative reconsideration, resulting in both tribunals having jurisdiction. An agency decision may thus be final for one purpose and yet nonfinal for another purpose. However, no cases hold that the same party may simultaneously seek both judicial and administrative review. We are convinced that under the circumstances of this case *Brotherhood of Locomotive Engineers* stands for the proposition that once the unions filed petitions to reopen and to revoke the exemption, the original *January 7 Decision* became nonfinal.

The court of appeals next examined whether the nonfinal *January 7 Decision* not to reject Winona Bridge's notice was nevertheless reviewable on other grounds. The court of appeals considered the situation comparable to the non-reviewable nonfinal decisions of the Federal Energy Regulatory Commission under the Federal Power Act, where the agency declines to reject a rate filing pending investigation into its

reasonableness, citing *Papago Tribal Util. Auth.* v. *Federal Energy*, 625 F.2d 235 (D.C. Cir. 1980), *cert. den.*, 449 U.S. 1061. (App. A, 12a-13a). Although the court of appeals acknowledged that allowing the trackage rights to go forward pending the administrative consideration of the petitions to reopen and to revoke would burden railroad employees, the majority considered itself bound by the doctrine of finality and the statutory scheme of the Staggers Act for challenges after the transaction has been consummated. (App. A, 13a-14a).

The court of appeals recognized the exception to nonreviewability where there is a clear jurisdictional defect (App. A, 14a), but that the exception is inapplicable here, because the jurisdiction dispute concerns Winona Bridge's status as a rail carrier, and the Commission did not believe it had sufficient information before it to establish that Winona Bridge was not a carrier. (App. A, 14a-15a).

5. Circuit Judge Fagg dissented, stating "Winona Bridge is an imposter." (App. A, 17a). He termed the matter a "charade" (App. A, 18a), and that a clear jurisdictional defect existed. (App. A, 18a):

> In my view, it is farcical to permit the trackage rights agreement to go forward on the strength of the Commission's mischievous "belief that it did not have sufficient information". . . . The exact contours of rail carrier status are no doubt open to interpretation. Even so, unless those contours are gerrymandered by the Commission, Winona Bridge will not qualify.

* * *

> There is a clear jurisdictional defect here. In this circumstance, the court should not turn Winter away empty-handed, particularly when it recognizes that "lack of jurisdiction will no doubt burden railroad employees."
>
> * * *
>
> Whatever else Winona Bridge may be it is not a rail carrier, and to treat it as one is a distortion of the regulatory process.

6. The Commission has yet to act upon the petitions to reopen, filed January 19 and 27, 1988, or upon the earlier-filed petitions to revoke.

REASONS FOR GRANTING THE WRIT

1. THE RULING THAT A REQUEST FOR AGENCY REOPENING CONVERTS A FINAL AGENCY ORDER INTO A NONFINAL ORDER REQUIRING DISMISSAL OF PETITION FOR REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT, AND WOULD UPSET SETTLED PRACTICE.

The opinion below incorrectly determined an important question of law by construing the decision of this Court in *I.C.C. v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, so contrary to its logical inferences. The opinion below would invalidate the present practice whereby parties seeking reopening or reconsideration of final federal agency orders are encouraged also to file a petition for review of such final agency action. Cf. *Eagle Pitcher Industries v. United States E.P.A.*, 759 F.2d 905 (D.C. Cir. 1985). The chaotic situation which

will arise is a certainty, as soon as the opinion below becomes known to those in administrative law practice. Parties cannot gamble where jurisdiction is involved, and where dismissal is the result of a wrong choice, as here. Parties will tend to seek judicial review, and forego requesting alternative relief at the agency, particularly if there is any likelihood the agency may attempt to place its order into effect at sometime during a reopening/reconsideration period.

The opinion below is contrary to settled practice where judicial review and administrative review are pursued simultaneously. Under the court of appeals ruling, a petition for review of a final agency order will be dismissed if a party has pending a petition before the agency to reopen the final agency order. An example of the dependence upon the ability to file in court as well as at the agency is the current docketing statement form for agency review proceedings required by the U.S. Court of Appeals for the D.C. Circuit, which asks in item 6(d) whether a request for rehearing or reconsideration is pending at the agency. (USCA Form 7).

There is no dispute that the Commission's January 7, 1988 decision denying the petition to reject Winona Bridge's notice of trackage rights exemption was a final Commission order. It was entered by the entire agency, with dissents. (App. C, 20a-29a). Such orders are final, and specifically are made subject to judicial review by 49 U.S.C. 10327(i).[5] See also: 5 U.S.C. 704.

This Court in *I.C.C. v. Brotherhood of Locomotive Engineers, supra,* was concerned with the effect a petition to reopen or to reconsider a Commission order would have on the 60-day

[5]Thus, Commission orders of this nature differ from those of some other agencies which require a petition for rehearing prior to the institution of judicial review. Cf. 16 U.S.C. 8251(b); 15 U.S.C. 717r.

time period set forth in 28 U.S.C. 2344 within which to petition for review of the final order, and this Court held that a timely petition for reconsideration stayed the running of the Hobbs Act's limitation period. 107 S.Ct. at 2368-69. This Court in the course of confirming settled judicial interpretation that a petition for agency reconsideration extended the 60-day limitation of 28 U.S.C. 2344 for filing a petition for review of the final agency order, stated that the reconsideration request rendered the order under reconsideration "nonfinal," citing two Supreme Court opinions, and one from a court of appeals. 107 S.Ct. at 2369, *supra*. However, an agency decision may be final for one purpose yet nonfinal for another purpose, which the court below recognized. (App. A, 12a).

Clearly, the opinion in *I.C.C. v. Brother of Locomotive Engineers* ruled that reconsideration rendered an agency decision "nonfinal" for purposes of the 60-day deadline of 28 U.S.C. 2344 for filing a petition for review, but did not imply that filing for reconsideration rendered the agency's final decision "nonfinal" for court jurisdiction under 28 U.S.C. 2342(5), or barred a petition for review while the petition for reconsideration is pending, yet undecided.

The opinion in *American Farm Lines v. Black Ball*, 397 U.S. 532, 541 (1970), recognized that in multi-party proceedings some may seek judicial review and others may seek administrative reconsideration, and that both tribunals have jurisdiction. The concept of an indivisible jurisdiction which must be all in one tribunal or all in the other does not fit the statutory scheme.

The opinions in *Civil Aero. Bd. v. Delta Air Lines*, 367 U.S. 316, 326-27 (1961), and *Outland v. C.A.B.*, 284 F.2d 224, 227 (D.C. Cir. 1960), do not hold that judicial jurisdiction is ousted if reconsideration/reopening is pending, but only that review may be deferred. The situation is one of interaction

between court and agency, without any necessary collision. *American Farm Lines v. Black Ball, supra* at 541:

> This power of the Commission to reconsider a prior decision does not necessarily collide with the judicial power of review. For while the court properly could provide temporary relief against a Commission order, its issuance does not mean that the Commission loses all juridiction to complete the administrative process. It does mean that thereafter the Commission is "without power to act inconsistently with the court's jurisdiction." *Inland Steel Co. v. United States,* 306 U.S. 153, 160.

Finally, it should be noted that the Commission's rules expressly contemplate simultaneous petitions to reopen and petitions for judicial review. 49 CFR 1115.6 (1987 ed.), reads as pertinent:

> If an appeal, discretionary appeal or petition seeking reopening is filed under section 1115.2 or section 1115.3 of this part, before or after a petition seeking judicial review is filed with the courts, the Commission will act upon the appeal or petition after advising the court of its pendency unless action might interfere with the court's jurisdiction.

The action of the court below in dismissing the petition for review for lack of a final order is contrary to this Court's decisions, and will be disruptive of the entire judicial and administrative processes, unless corrected by this Court.

II. THE RULING THAT THE AGENCY DECISION IS NOT REVIEWABLE ALTHOUGH PATENTLY OUTSIDE AGENCY JURISDICTION SHOULD BE SETTLED BY THIS COURT.

The court of appeals recognized there are exceptions to the rule that only final Commission decisions are subject to the reviewable jurisdiction of the court of appeals. If this Court should reverse the dismissal below, thereby finding a final agency order, it would seem unnecessary to reach that part of the opinion below which held that circumstances did not warrant review of an initial and nonfinal agency decision.

The opinion below analogized what it termed a Staggers Act transaction with the nonreviewability of decisions not to reject rate filings. (App. A, 13a, 17a). However, there is nothing in the Staggers Act which specifies that examination of an exempt transaction by the Commission should occur only after consummation of the transaction.

The request to "reject" a rate filing, is the same as to ask for suspension and investigation of a rate filing, which are not subject to judicial review except in the most extraordinary situation. *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963); *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). *Papago Tribal Util. Auth. v. Federal Energy*, 628 F.2d 235, 243 (D.C. Cir. 1980), *cert. den.* 449 U.S. 1061. But a rate filing is vastly different from the trackage rights class exemption.

The court of appeals stated the method for challenging an exempt trackage rights is a petition to revoke under 49 U.S.C. 10505(d), and that the filing of such a petition will not stay the effectiveness of the exemption, for the Commission is to review carrier actions after the fact. (App. A, 6a, 14a, 16a).

The opinion below in this regard is not based upon statutory language, but upon a statement in the House-Senate Conference report. The Conference report referred to the possible adoption of an agency policy of reviewing carrier actions after the fact to correct abuses of market power. H. Rept. 96-1430 (Conf.), 105. 1980 U.S. Code Cong. & Adm. News 4110, 4137. Here, the issue is not abuse of market power, but the jurisdiction of the agency in light of Winona Bridge's clear status as a non-carrier. Moreover, a conference report — particularly the one in question — is not a suitable substitute for statutory language and probative legislative history. See: Eckhardt, Robert C., *Western Coal Traffic League Case*, 13 Transp. L. J. 307, 316-17 (1984).

There is no prohibition against a stay of the use of a particular class exemption. Contrary to the inference by the court below that petitions for stay will not lie, the Commission recently issued notice that petitions for individual stays will be entertained in exemption cases, specifically citing the trackage rights class exemption involved herein. *Exemption of Out-of-Service Rail Lines (Notice of Stay Procedures)*, 4 I.C.C. 2d 400, 401 (1988). See also dissent of Commissioner Lamboley. (App. C, 35a-37a).

The fact that 49 U.S.C. 10505(d) provides for petitions to revoke class exemption, does not preclude other forms of relief by the Commission, or serve to prevent issuance of stays.

The dissent of Judge Fagg points to the farcical nature of the majority's ruling. (App. A, 17a-18a). Winona Bridge is an imposter. It is simply a defunct railroad bridge that goes nowhere and is out of service. (*ibid.*).

The jurisdictional defect is patent. Certainly there is power in the judiciary to review the Commission's January 7, 1988 decision, even assuming it became nonfinal upon the filing of petitions to reopen the decision. (App. A, 14a).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorney for Petitioner

August 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1250

M. M. Winter,

Petitioner,

v

Interstate Commerce Commission and United States of America,

Respondents,

On Petition for Review of an Order of the Interstate Commerce Commission

Submitted: May 11, 1988
Filed: July 12, 1988

Before FAGG, WOLLMAN, and BEAM, Circuit Judges.

WOLLMAN, CIrcuit Judge.

M. M. Winter, General Chairman of the United Transportation Union (UTU), filed this petition for judicial review of an Interstate Commerce Commission (Commission) decision denying his petition[1] to reject Winona Bridge Railway Company's (Winona Bridge) exemption from the regulatory requirements of the Interstate Commerce Act, 49 U.S.C. §

[1]Two other labor unions, the Railway Labor Executives' Association (RLEA) and the Brotherhood of Locomotive Engineers, also challenged the exemption.

11343(a)(6),[2] with respect to Winona Bridge's acquisition of trackage rights over Burlington Northern Railroad Company's (BN) line.[3] *See Winona Bridge Railway Company — Trackage Rights — Burlington Northern Railroad Company,* (the *January 7 Decision),* Finance Docket No. 31163 (Jan. 7, 1988), *petitions to reopen filed,* January 19 and 27, 1988. After the Commission moved to dismiss Winter's petition for lack of a reviewable order, we granted Winter's request for a temporary stay of the *January 7 Decision* and ordered expedited briefing on all issues concerning the stay, the pending motion to dismiss, and the underlying merits of the action. Because we conclude that the *January 7 Decision* is not a final order, we dismiss the appeal and vacate the stay. We also decline to invoke our authority under the All Writs Act, 28 U.S.C. § 1651 to issue a writ compelling the Commission to reject the exemption.

I. BACKGROUND

Winona Bridge, a wholly-owned subsidiary of BN, owns a railroad bridge across the Mississippi River between Winona, Minnesota, and E. Winona, Wisconsin. The 1.07 mile-long bridge has been out of service since September 1985. On

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[2]49 U.S.C. § 11343(a)(6) provides:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> * * * *
>
> (6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

[3]Winona Bridge and BN (jointly railroad intervenors) intervened in defense of the Commission's position. The RLEA intervened on behalf of Winter.

November 16, 1987, Winona Bridge and BN entered into an agreement in which BN granted Winona Bridge trackage rights[4] over BN's Northern line between Winona Junction, Wisconsin, and Seattle, Washington, a distance of approximately 1,860 miles. BN entered into this agreement in an effort to compete with trucking companies that provide low-cost services for long-distance transportation. Originally, BN had planned to implement "Expeditor service" employing one engineer and one conductor on its Northern line from St. Paul, Minnesota, to Seattle, Washington. Because BN's negotiations with the UTU for reduced crew size were unsuccessful, BN decided to use its subsidiary, Winona Bridge, to operate over the Northern line with two-man crews. In the planned transaction, Winona Bridge would hire new employees not subject to BN's labor agreements. BN informed its employees that if the unions would agree to reduced crew size, Winona Bridge would not begin operations. BN granted Winona Bridge the right to pick up and set out traffic at BN's intermodal hub centers in St. Paul, Spokane, and Seattle, which will enable BN to compete with motor carriers for trailer-on-flat-car and container-on-flat-car traffic.

Under the Interstate Commerce Act, the Commission must regulate all trackage rights agreements. *See* 49 U.S.C. § 11343(a)(6). More recently, however, in light of the severe financial crisis facing the nation's rail industry, Congress realized that extensive regulation was prohibiting railroads from

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[4]There are two basic types of trackage rights agreements. In so-called "bridge" trackage rights agreements, the owner railroad permits the tenant railroad to use its tracks from one point to another, but withholds permission to serve customers along the route. This allows the tenant carrier to create new routes for long-distance customers. In "extension" trackage rights agreements, the tenant railroad is allowed to serve freight customers along the line. *Illinois Commerce Commission v. ICC*, 819 F.2d 311, 312 (D.C. Cir. 1987).

becoming economically viable. In 1980, Congress enacted the Staggers Act, which directs the Commission to exempt from regulation all transactions that it finds do not require regulation to cary out the national transportation policy and are either of limited scope or involve situations in which regulation is not needed to protect shippers from the abuse of market power. *See* 49 U.S.C. § 10505(a);[5] *see also Winter v. ICC*, 828 F.2d 1320, 1321 (8th Cir. 1987). Through the Staggers Act, Congress intended to liberalize the regulatory framework that the Interstate Commerce Act imposed on the railroad industry. Congress hoped that an improved regulatory climate would "increase the rail industry's productivity and enhance financial returns sufficiently to encourage an infusion of private capital into the industry" to prevent the collapse of the nation's rail industry. *Simmons v. ICC*, 697 F.2d 326, 328 (D.C. Cir. 1982). The Commission was charged with responsibility

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[5]49 U.S.C. § 10505 provides in pertinent part:

> Authority to exempt rail carrier transportation
>
> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commisison under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle:
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
>
> * * * *
>
> (d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

for actively pursuing exemptions for transportation and services that would allow competition and would minimize the need for regulatory control over the rail industry. *American Trucking Ass'ns, Inc. v. ICC*, 656 F.2d 1115, 1119 (5th Cir. 1981); *see also* H.R. Rep. No. 1035, 96 Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4005.

Following this congressional mandate, the Commission determined that certain trackage rights agreements between rail carriers, as a class, should be exempt from regulation. *Railroad Consolidation Procedures — Trackage Rights Exemption*, Ex Parte No. 282 (Sub-No. 9), 1 I.C.C. 2d 270 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 819 F.2d 311 (D.C. Cir. 1987). The Commission concluded:

> [T]rackage rights based on written agreements and not filed as responsive applications to rail consolidation proceedings should be exempted from regulation. Transactions that permit only bridge rights will maintain the competitive balance among carriers, preserve shippers' existing transportation choices, give shippers access to alternative routes with shorter, faster, or otherwise improved routing and increase the operational efficiency of the participating carriers. Improving operating efficiences will help ensure the continued development of sound rail transportation systems, foster sound economic conditions, encourage efficient management, and promote energy conservation.

Id. at 275-76; *see also* 49 C.F.R. § 1180.2(d)(7) (1987).

The trackage rights class exemption allows a transaction between two rail carriers to be consummated seven days after the railroad files a notice with the Commission. 49 C.F.R. § 1180.4(g)(1). If the notice contains false or misleading infor-

mation, the Commission may summarily revoke it. *Id.* at § 1180.4(g)(1)(ii). The Commission must publish a summary of the transaction in the *Federal Register* within twenty days of filing. *Id.* at § 1180.4(g)(2)(ii). The procedural mechanism for other interested parties to challenge exempt trackage rights agreements is a petition to revoke under 49 U.S.C. § 10505(d). *Id.* The filing of such a petition does not stay the effectivness of an exemption. Rather, the Commission will review carrier actions after the fact to correct abuses of market power. *American Trucking Ass'ns, Inc. v. ICC*, 656 F.2d at 1120 (quoting H.R. Rep. No. 1430, 96 Cong., 2d Sess. 105, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137).

All trackage rights exemptions are subject to the standard employee protective conditions. These so-called *Mendocino Coast* labor protective conditions protect employees adversely affected by a grant of trackage rights for up to six years. *See Mendocino Coast Ry. — Lease and Operate — California W. R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom., RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

Winona Bridge filed its notice of exemption with the Commission on November 18, 1987. On November 25, 1987, the RLEA filed a petition to void, revoke or stay the exemption on the ground that the application of the Interstate Commerce Act was necessary to carry out the national transportation policy and that the notice contained misleading information. Specifically, the RLEA argued that fair wages and safe and suitable working conditions are a national transportation goal, *see* 49 U.S.C. § 10101a(12), and that the purpose of Winona Bridge's trackage rights agreement was to circumvent labor agreements. The RLEA argued that the exemption was void on its face because it contained misleading information in that the purpose of the agreement was to evade the provisions

of the Railway Labor Act and to pay lower wages and provide less beneficial working conditions to employees.

The Commission published notice of the exemption on November 25, 1987, continuing the transaction in force subject to the *Mendocino* labor conditions. On December 2, 1987, Winter filed a petition to reject and/or revoke the exemption. Winter argued that Winona Bridge was not a carrier and thus could not invoke the trackage rights class exemption from 49 U.S.C. § 11343(a)(6), which regulates transactions between two carriers. Although acknowledging that previous Commission cases referred to Winona Bridge as a carrier, Winter argued that a "rail carrier" for purposes of the exemption is "a person providing railroad transportation for compensation," 49 U.S.C. § 10102(20), and that Winona Bridge was currently an out-of-service railroad bridge.

On January 7, 1988, the Commission issued its 3-2 decision denying the petitions to reject Winona Bridge's notice of exemption. The Commission deferred ruling on the petitions to revoke. Reasoning that the class exemption regulations do not require an explanation of the railroad carrier's underlying motivations for entering into a trackage rights agreement, the Commission disagreed with the RLEA's contention that the notice was misleading. It also disagreed with Winter's contention that Winona Bridge was not a carrier within the meaning of section 11343(a)(6), noting that the RLEA had characterized Winona Bridge as a switching carrier and that previous Commission decisions had considered Winona Bridge a carrier. The Commission stated that merely because Winona Bridge does not perform, and may never have performed, its own transportation services is not determinative of its common carrier status and that Winona Bridge could be found to have a residual common carrier obligation. The Com-

mission concluded that Winter had "not presented any evidence to permit [it] to resolve definitively the status of [Winona Bridge] in this decision," and that Winter and the RLEA had "failed to establish a basis for rejecting or otherwise finding [Winona Bridge's] notice of exemption void *ab initio.*" Mem. op. at 3.

Two commissioners dissented from the majority opinion. Vice-chairman Lamboley stated that he would stay the operation of the exemption. He found that the majority's findings concerning Winona Bridge's carrier status were "superficial at best" and that the issues needed to be addressed in greater detail. He relied on the standards for measuring carrier status outlined in *Brotherhood of Locomotive Engineers v. Interstate R.R. Co., et al.*, Finance Docket No. 31078 (Nov. 27, 1987). Relevant factors are whether an entity holds itself out as a common carrier for hire as shown by tariff publication, actual movement of traffic, and whether it has the ability to so perform. In applying the *Interstate* standards to Winona Bridge, Commissioner Lamboley noted that no traffic had moved over Winona Bridge since 1985 when the bridge closed and that Winona Bridge has no rail service employees. There are no tarrifs on file, and there is some question whether operations over the bridge could safely resume. He thus concluded that the Commission should stay the exemption and ask the parties to address the matter further. Commissioner Simmons also suggested that the Commission should have stayed the transaction and set the proceeding for notice and comment. Neither of the dissenting commissioners stated, however, that Winona Bridge's status was so clear that the Commission could reject the exemption without further proceedings.

Both Winter and the RLEA filed petitions to reopen the *January 7 Decision*. *See* 49 U.S.C. § 10327(g)(1); 49 C.F.R. § 1115.3 (1987). The Commission denied the unions' subse-

quent request for a stay.[6] The Commission has not yet decided the petitions to reopen and has not ruled on the revocation requests filed earlier.

II. DISCUSSION

Winter argues that the Commission's decision not to reject Winona Bridge's notice of exemption should be set aside as arbitrary and capricious and in excess of statutory jurisdiction. *See* 5 U.S.C. § 706(2)(A), (C). To address this contention, however, we must first determine whether the *January 7 Decision* is a reviewable order. We have jurisdiction to review only final orders of the Commission. 28 U.S.C. § 2344. Citing *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987), Winter argues that the *January 7 Decision* is reviewable and that the pending petitions to reopen and for revocation do not impair its finality. Interestingly, the Commission cites the same case for the opposite proposition. We agree with the Commission's interpretation.

In *Brotherhood of Locomotive Engineers*, the Court analyzed the finality of Commission decisions in various circumstances. Under the first scenario, if the Commission *grants* a petition for reconsideration of an original order and issues a new order, the new order is the reviewable final order. This is so even if the new order merely reaffirms the rights and obligations of the original order. *Id.* at 2365.

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[6]In related proceedings, on March 29, 1988, BN filed an action in the United States District Court for the Northern District of Illinois seeking to enjoin a potential labor strike resulting from the trackage rights agreement exemption. *See Burlington Northern R.R. Co. v. United Transp. Union*, No. 88-C-2687. UTU filed a counter claim alleging that consummation of the transaction would violate the Railway Labor Act.

Second, when the Commission *denies* a timely petition for reconsideration alleging material error, the "petition tolls the period for judicial review of the original order, which can therefore be appealed to the courts *directly* after the petition for reconsideration has been denied." *Id.* at 2366. For example, in *Brotherhood of Locomotive Engineers*, the Commission issued an order granting two railroad companeis the right to use the tracks of a third carrier. Subsequently, a union filed a petition for clarification of the order, contending that the Commission's approval of the trackage rights agreement did not authorize the tenant railroads to use their own crews. The Commission held that its order was unambiguous and denied the union's petition. The union then filed a petition for reconsideration on the ground that the tenant railroad's crewing procedures violated employee protections. After the Commission denied that petition, the union sought judicial review. The Court determined that neither the order denying the petition for clarification nor the order denying the petition for reconsideration based on material error was reviewable. The union should have appealed the original order after its subsequent petitions were denied.

A third situation involves the status of an original order during the time period after a petition for reconsideration has been filed, but before the Commission has acted upon it. That is the situation in this case. Relying on the Administrative Procedure Act, 5 U.S.C. § 704, Winter and the RLEA argue that although a petition for reconsideration will toll the time period within which a party must file a petition for review, it does not bar judicial review of the original order.

The Court discussed finality in the context of whether an appeal was timely filed. Because an appeal must be filed within sixty days of a final order, the Court was required to determine when a Commission order becomes final for purposes

of starting the running of the limitation period. The Court analyzed the language of the Administrative Procedure Act, 5 U.S.C. § 704, which provides in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is operative, for an appeal to superior agency authority.

The Court acknowledged that the above-quoted language would seem to suggest that the pendency of motions for reconsideration do not impair the finality of Commission orders.[7] Courts, however, have long construed the language of the Administrative Procedure Act as merely relieving parties from the requirement of petitioning for rehearing before seeking judicial review, unless specifically required to do so by statute. *Id.* at 2369. The Court cited with approval various cases holding that petitions that are actually filed render the orders under consideration nonfinal. For instance, in *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), the court observed:

> Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied * * *. [W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial re-

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[7]Similarly, 49 U.S.C. § 10327(i) provides that " '[n]otwithstanding' the provision authorizing the Commission to reopen and reconsider its orders (§ 10327(g)), 'an action of the Commission . . .is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.'" *Brotherhood of Locomotive Engineers* 107 S. Ct. at 2368-69 (quoting 49 U.S.C. § 10327(i)).

> view unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon.

Id. at 227-28; *see also American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 541 (1970) (where motion for rehearing is filed there is no final action until rehearing is denied); *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 326 (1961) (administrative order is not final for purposes of judicial review until agency has disposed of outstanding petitions for reconsideration).

Winter correctly notes that in multi-party proceedings one party may seek judicial review of an agency decision while another party seeks administrative reconsideration, resulting in both tribunals having jurisdiction. An agency decision may thus be final for one purpose yet nonfinal for another purpose. However, no cases hold that the same party may simultaneously seek both judicial and administrative review. We are convinced that under the circumstances of this case *Brotherhood of Locomotive Engineers* stands for the proposition that once the unions filed petitions to reopen and to revoke the exemption, the original *January 7 Decision* became nonfinal.

The railroad intervenors argue that the case most pertinent to the jurisdictional issue before the court is *Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980). In *Papago*, the District of Columbia Circuit held that an order of the Federal Energy Regulatory Commission denying a customer's motion to reject a rate filing on the ground of patent defects was not reviewable. *Id.* at 241. The court noted that generally an order is final if it " 'imposes an obligation, denies a right, or fixes some legal obligation as a consummation of the administrative process.' " *Id.* at 239 (quoting *Cities Service Gas Co. v. FPC*, 255 F.2d

860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958)). The decision to accept a filing, however, merely initiates the administrative process. It is analogous to denying a motion to dismiss. It decides nothing about the merits of the case, is quickly made without time for considered judgments on the law or the facts, and gives the reviewing court no factual record to examine. Judicial intervention would be cumbersome and inappropriate because a court would act with little factual basis and without the benefit of the Commission's views on relevant question of law and regulatory polilcy. Thus, the court concluded that the initial decision not to reject a rate filing was not reviewable.

Winter and the RLEA offer several reasons why *Papago* is not dispositive of this case. Winter first argues that *Papago* was a rate case, and the court relied upon a specific statutory directive that agency decisions whether to suspend or investigate rates are not reviewable. The railroad intervenors correctly note, however, that the court specifically stated that its conclusion did not depend on statutory language. The RLEA argues that the statutory scheme in this case is distinguishable from the one in *Papago* because under the Staggers Act a transaction that is exempted from prior Commission approval may be implemented within seven days, whereas under the Federal Power Act customers are protected by a five-month suspension period.

Although the two statutory schemes are not identical, we are satisfied that they are analogous and that *Papago* is dispositive of this case. We realize that if we dismiss this appeal for lack of a final order, the trackage rights agreement will go into effect before either the Commission or a court will have made a comprehensive analysis of whether Winona Bridge is a carrier entitled to to evoke the trackage rights agreement exemption. Allowing this transaction to go forward in light of

the possibility that the Commission will ultimately revoke the exemption for lack of jurisdiction will no doubt burdern railroad employees. Nevertheless, we are bound by the doctrine of finality and the statutory scheme of the Staggers Act, which provides for challenges to the Commission's actions through revocation proceedings after the transaction has been consummated.

The RLEA next argues that although both *Papago* and this case involve challenges to an agency's threshold acceptance of a filing, the two cases are fundamentally different because in *Papago* the request for rejection of a filing was based essentially on substantive challenges to the action, whereas in this case the challenge is on jurisdictional grounds, i.e., whether the railroad intervenors are allowed to utilize the class exemption procedures. They point out that in *Papago*, the court specifically noted that a rate filing clearly outside the bounds of an agency's statutory authority is immediately reviewable. *Papago Tribal Utility Auth. v. FERC*, 628 F.2d at 243 n.20.

Although we agree with the RLEA that cases in which there is a clear jurisdictional defeat constitute an exception to the final order requirement, that exception is not applicable here.[8] Cases in which there is a clear jurisdictional defect are distinguishable from cases, such as this one, that give rise only to clear jurisdictional disputes. *Marine Wonderland Animal Park, Ltd. v. Kreps*, 610 F.2d 947, 950 (D.C. Cir. 1979). When jurisdiction is merely in dispute, however, the agency should be allowed to make the initial determination of its jurisdiction. *Id.* Here, the jurisdictional dispute concerns Winona Bridge's status as a rail carrier within the meaning of setion 11343. The Commission refused to summarily revoke the notice as void

[8]Winter contends that because the *January 7 Decision* is a final order, exceptions to the final order doctrine need not be discussed.

on its face because it believed that it did not have sufficient information before it to establish that Winona Bridge was not a carrier subject to its jurisdiction. The Commission must be given the opportunity to make this determination in the pending revocation proceeding. We therefore do not accept Winter's assertion that by dividing its decision into a rejection phase and a revocation phase the Commission made a final decision that it had jurisdiction.

We also do not believe that allowing the transaction to go forward will irreparably harm union members. Under the labor protections imposed by the Commission, BN employees adversely affected by the transaction will maintain their current salary and benefits for a period of six years. Although the unions argue that BN employees who have been laid off will lose their seniority with BN if they accept jobs with Winona Bridge, these employees are not compelled to begin new jobs with Winona Bridge as a result of the consummation of the transaction. Rather, employees have a choice to accept or reject the offer of employment.

As an alternative theory, the RLEA argues that under *Abbott Laboratories v. Gardner*, 387 U S. 136 (1967), this case is ripe for judicial review. In *Abbott Laboratories*, drug manufacturers challenged a regulation requiring them to indicate the established name of a drug every time its proprietary name was employed. Although the new regulation had not yet been forced against anyone, the Court determined that the controversy was ripe for judicial review because the case involved a purely legal question of statutory construction and no further administrative proceedings were contemplated. Additionally, viewing the issue of finality in a pragmatic way, the Court concluded that the formal promulgation of the regulation constituted final agency action. The regulations gave an authoritative interpretation of a statutory provision and had

a direct and immediate impact on all prescription drug companies, requiring them to change all their labels and advertisements or risk prosecution.

The RLEA argues that in this case the question whether Winona Bridge is a "carrier" entitled to use the exemption is a legal determination. It argues that although petitions to reopen are pending and the Commission may revoke the exemption, because the effect of the Commission's refusal to reject the exemption is to allow the railroad companies to consummate the trackage rights agreement the decision constitutes a final agency action. We cannot agree.

This case is distinguishable from *Abbott Laboratories*. There, further administrative proceedings were not contemplated, whereas in this case the unions may ultimately receive the relief they seek in subsequent Commission action. More importantly, as we have already indicated, the revocation provisions of the Staggers Act contemplate that the Commission will review exempt transactions after they are consummated. We would violate the statutory scheme if we were to intrude into the administrative process at this point.

Accordingly, we hold that the *January 7 Decision* is not a final order and that we have no appellate jurisdiction.

Likewise, we conclude that this case does not warrant the invocation of our power under the All Writs Act, 28 U.S.C. § 1651.

The fact that a nonappealable order is possibly erroneous on a jurisdictional question is not grounds for granting the extraordinary remedy of a writ. *In re State of South Dakota*, 692 F.2d 1158, 1160 (8th Cir. 1982). Jurisdiction must be clearly lacking to justify issuance of a writ.

The challenged assumption or denial of jurisdiction

> must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible errors.

Id. at 1161 (quoting *American Airlines, Inc. v. Forman*, 204 F.2d 230, 232 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953)).

The Commission's decision not to reject the exemption on the ground that Winona Bridge was not a carrier under 49 U.S.C. § 11343 was not so plainly wrong that it indicates that the Commission did not understand an unambiguous statutory provision. Prior decisions discussing Winona Bridge's status were contradictory, and the Commission did not have the benefit of a well-developed factual record before it when it made its initial decision. Additionally, neither of the dissenting commissioners concluded that the lack of jurisdiction was so clear that the notice of exemption should be rejected. Rather, they argued that the issues needed further development. We therefore conclude that the Commission's action does not constitute a clear abuse of discretion or usurpation of power.

The writ is denied, and the appeal is dismissed for lack of jurisdiction.

FAGG, Circuit Judge, dissenting.

In this case Winona Bridge is an impostor. It is inescapably clear from the information presented to the Commission, *see ante* at 7a-9a, that Winona Bridge is not a rail carrier — it is nothing more than the owner of a defunct railroad river bridge. For this reason it will be impossible for Winona Bridge, without

carrier status, to "invoke the trackage rights class exemption from 49 U.S.C. § 11343(a)(6), which regulates transactions between two carriers." *Ante* at 7a.

In my view, it is farcical to permit the trackage rights agreement to go foward on the strength of the Commission's mischievous "belie[f] that it did not have sufficient information before it to establish that Winona Bridge was not a carrier subject to its jurisdiction." *Ante* at 15a. The exact contours of rail carrier status are no doubt open to interpretation. Even so, unless those contours are gerrymandered by the Commission, Winona Bridge will not qualify.

It is one thing for Congress "to liberalize the regulatory framework," *ante* at 4a, and to permit the Commission to exempt trackage rights agreements between rail carriers. It is an entirely different matter, however, for the Commission to countenance the charade at hand. There is a clear jurisdictional defect here. In this circumstance, the court should not turn Winter away empty-handed, particularly when it recognizes that "lack of jurisdiction will no doubt burden railroad employees." *Ante* at 14a.

Whatever else Winona Bridge may be it is not a rail carrier, and to treat it as one is a distortion of the regulatory process. Thus, I dissent.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1250

M. M. Winter, Petitioner, v Interstate Commerce Commission and United States of America, Respondents.	* * * * * * * * * * * *	On Petition for Review of an Order of the Interstate Commerce Commission.

Filed: May 13, 1988

Before FAGG, WOLLMAN, and BEAM, Circuit Judges.

ORDER

The appeal is dismissed for want of a final order. The stay previously entered by the court is vacated. A formal opinion in support of the order will be filed at a later date. Judge Fagg dissents from the order.

A true copy.
Attest:
/s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

SERVICE DATE
JANUARY 7, 1988

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION
Finance Docket No. 31163

WINONA BRIDGE RAILWAY COMPANY — TRACKAGE RIGHTS — BURLINGTON NORTHERN RAILROAD COMPANY

Decided: December 23, 1987

Winona Bridge Railway Company (WB), a wholly-owned subisidary of the Burlington Northern Railroad Company (BN), filed a notice of exemption under 49 CFR 1180.2(d)(7) and 1180.4(g)(2) for its acquisition of bridge trackage rights over approximately 1,860 miles of BN line between Winona Junction, WI, and Seattle, WA. The trackage rights agreement restricts WB from serving or conducting switching operations for industries located on the BN trackage except that WB may pick up and set out traffic at BN's TOFC/COFC hub centers in St. Paul, MN, and Spokane and Seattle, WA. The trackage rights agreement became effective on Novemer 25, 1987. The notice of exemption was served and published in the *Federal Register* on December 4, 1987 (52 F.R. 46129).

The Railway Labor Executives' Association (RLEA) petitioned to void or revoke the exemption [1] M.M. Winter, Gen-

[1]RLEA also styles its petition as an alternative request for a stay. However, RLEA neither refers to nor attempts to satisfy the requisite stay criteria. *See Commonwealth — Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983); *accord, Washington Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); and *Cuomo v. Nuclear Regulatory Commission*, 772 F.2d 973 (D.C. Cir. 1985). Since RLEA has offered no support whatsoever for this request, we will not address this issue.

eral Chairman for the United Transportation Union (UTU), petitioned to revoke or reject it, and the Brotherhood of Locomotive Engineers (BLE) petitioned for revocation. WB has filed replies to the petitions of RLEA and UTU. We are denying petitioners' rejection requests, and in a subsequent decision we will consider their requests that we revoke the exemption.

RLEA asserts that the proposed transaction is primarily if not exclusively an attempt by BN to evade its obligations under the Railway Labor Act, 45 U.S.C. 151, *et seq.*, (RLA), to negotiate more beneficial wages and working conditions. Assertedly because the exemption notice did not disclose this purpose, RLEA states that it was misleading and requests that it be found void *ab initio* in accordance with 49 CFR 1150.34.[2] In support of this allegation, RLEA argues that the wages and working conditions of the new WB employees will not be based on transcontinental railroad operations and the more beneficial wages and working conditions that similarly situated BN employees now received. Instead, the compensation for WB's transcontinental employees is to be based on maintenance of way rates of pay and the type of short mileage operations now performed by WB. RLEA notes that WB is a switching carrier presently operating over only 1 mile of track. It only has five employees, and none of them are believed to be engaged in rail operations. It contends that these employees are represented by the Brotherhood of Maintenance of Way Employees under contract provisions applicable only to maintenance of way employees.

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[2]RLEA's reliance on 49 CFR 1150.34 to support this contention is misplaced. That section applies only to notices of exemption filed under 49 CFR 1150.31. This notice of exemption was filed under sections 1180.2(d)(7) and 1180.4(g)(2). While the void *ab initio* language does not technically apply to notices of exemption filed under section 1180, RLEA's argument is germane nevertheless and is entitled to substantive consideration.

UTU contends that WB is not a carrier within the meaning of 49 U.S.C. 11343 and our exemption regulations. It suggests that, if anything, WB may be a new carrier, and, as a consequence, the proposed transaction falls under 49 U.S.C. 10901, rather than section 11343 and the corresponding class exemption for trackage rights in section 1180.2(d)(7). UTU also contends that the exemption is merely an attempt to change BN's employment contracts in contravention of the RLA. Additionally, in support of its rejection request, UTU notes that the exemption notice failed to disclose that WB's track does not extend to Winona Junction, the eastern terminus of the proposed trackage rights operation, and failed to specify the date the trackage rights agreement is to be consummated, as required by section 1180.4(g)(2)(i).

DISCUSSION AND CONCLUSIONS

RLEA and UTU are opposed to WB's trackage rights proposal because in their view it represents an attempt by BN to circumvent the RLA and the rail transportation policies of 49 U.S.C. 10101a(12). In effect they are ascribing to the proposal an underlying motivation and contesting it because of WB's failure to acknowledge as much in its notice of exemptio. Our class exemption regulations do not require explanations or statements of underlying motivations. A brief statement of the nature of the exemption transaction is sufficient. WB's notice of exemption filing obviously alerted interested parties to the nature of the transaction. Accordingly, we disagree with RLEA's contention that the notice was misleading and should be rejected as being void *ab initio*.

We also disagree with UTU's arguments regarding the accuracy of the trackage rights description and the specification of a consummation date. WB's notice and caption summary clearly stated that the trackage rights are over BN track be-

tween Seattle and Winona Junction. The fact that WB's line does not connect at either terminus simply means that trackage rights operations were to be performed at both ends of WB's line. We find nothing wrong with this arrangement or with the description that was contained in the notice of exemption. Moreover, as to the consummation date, our regulations require that the party invoking the class exemption state the date the trackage rights agreement is proposed to be consummated. "49 CFR 1180.4(f)(i) . . . (6)" The notice states that:

> The parties propose to implement the trackage rights operation following the negotiation of transportation contracts for exempt traffic moving over the trackage rights corridor. The parties will inform the Commission of the use of Winona's trackage rights over BN following negotiations of transportation contracts. Commission authorization of the trackage rights at this time is necessary to enable Winona to successfully negotiate the contemplated contract movements. For this reason, BN and Winona request that the trackage rights exemption be made effective November 25, 1987, pursuant to 49 CFR 1180.4(g)(1).

BN and Winona simply do not know the specific date on which consummation will occur, because it cannot occur until after the execution of future contracts. Since the assurance that the exemption has become effective is a predicate to negotiating the contracts, the parties have stated the consummation date with as much specificity as they can. In doing so, they have satisfied the letter as well as the intent of our regulation. *See* Finance Docket No. 31116, *Buffalo & Pittsburgh R., Inc. — Exempt. — Acq. & Oper. of Lines in NY and PA* (not printed), served October 19, 1987.[3]

[3]Embraces Finance Docket No. 31117, *Genesee & Wyoming Industries, Inc., The Arthur J. Walker Estate Corp. and Dumaines and Buffalo and Pittsburgh R., Inc. — Exempt Control.*

Nor do we agree with UTU's contention that the notice was inappropriate and should have been rejected on the grounds that WB is not a carrier within the meaning of section 11343. UTU staes that WB does not provide, and has never provided, transportation, but it offers no evidence to substantiate this statement. RLEA, on the other hand, characterizes WB as a switching carrier and notes that it was established in 1890.

A switching carrier is clearly a carrier within the meaning of 49 U.S.C. 10102(19), (20)(A), (25), and 11343. Moreover, we have previously considered WB a carrier for purposes of granting trackage rights over its line. *See Chicago B.&Q.R. Co. Operation*, 230 I.C.C. 507 (1938); and *Chicago G.W.P. Co. Aband.*, 187 I.C.C.253, 260 (1932). Most recently WB was referred to as a carrier in *Burlington Northern, Inc. — Control of Merger — St. L.*, 360 I.C.C. 788, 797 (1980). The fact that WB does not perform and may never have performed its own transportation services is not determinative of its common carrier status. While UTU has not presented any evidence to permit us to resolve definitively the status of WB in this decision and, in the interests of addressing RLEA's and UTU's petitions, we have not waited for replies from BN and WB, it appears that WB could be found to have a residual common-carrier obligation with respect to the operation of its track. Moreover, WB would be expected to file an application under 49 U.SC. 10903, *et seq.*, if it sought to abandon the track. Accordingly, on this record we find no basis to conclude that WB is not a carrier subject to our jurisdiction. Thus, it may use the class exemption procedure at issue here.

On the basis of these considerations, we find that petitioners have failed to establish a basis for rejecting or otherwise finding WB's notice of exemption void *ab initio*. In a subsequent decision, after WB has had an opportunity to respond, we will consider the merits of petitioners' revocation requests.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for rejection are denied.

2. This decision is effective on the service date.

By the Commission, Chairman Gradison, Vice Chariman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

VICE CHAIRMAN LAMBOLEY, dissenting:

I would stay the operation of this exemption.[1] Our jurisdiction to evaluate and authorize trackage rights, whether by application under Section 11343, petition for exemption under Section 10505, or, as here, by claim of class exemption under 49 C.F.R. 1180.2(d)(7),[2] is premised on an agreement be-

[1]Although the exemption became effective November 25, 1977, BN states Winona Bridge does not anticipate commencement of operations prior to February, 1988. Accordingly, BN will not be prejudiced by our consideration of relevant matters here.

[2]See also Ex Parte No. 282 (Sub-No. 9), *Railroad Consolidation Procedures — Trackage Rights Exemption,* 1 I.C.C. 2d 270, (1985).

tween two rail carriers. Setting aside for the moment the question of whether conferral of 1,860 miles of trackage rights by a parent to its wholly-owned, but equipment-less and virtually employee-less subsidiary is contemplated by the class exemption, there are several unresolved issues concerning the status of Winona Bridge (WB) as a carrier. The majority's findings in this regard are, in my judgment, superficial at best. The facts presented illustrate that the issue needs to be addressed in greater detail.

In Finance Docket No. 31078, *Brotherhood of Locomotive Engineers v. Interstate R.R. Co., et al.* (not printed), served November 27, 1987 (*Interstate*), the Commission recently revisited and reasserted its historic standards in measuring carrier status. As outlined there, we examine each particular operation to determine if an entity holds itself out as a common carrier for hire, as shown by tariff publication, actual movements of traffic, or other factual indicia, and whether it has the ability to so perform. In contrast to the majority's conclusions, these standards, in my view, necessarily require something more than reliance on past operations, previous Commission designations, or, notwithstanding any other facts, possible "residual" common carrier obligation.

Here, WB's past switching operations were historically conducted solely with the equipment and by the employees of its owners, BN and Green Bay and Western (WB is now apparently owned solely by BN). WB owns only the bridge and related lead track. Its few employees were bridge tenders who open the bridge spans for river traffic; they did not perform any of the ivolved rail service.

However, in late 1985, operations over WB ceased. In Finance Docket No. 30581 (Sub-No. 1), *Burlington N. R.R. Co. and Milw. Rd. Inc. - Pooling Agreement* (not printed), served November 7, 1985 (*Pooling*), we granted BN its re-

quest to reroute its traffic to bypass WB via a pooling agreement with the Milwaukee Road. As justification, BN cited the deteriorated condition of the bridge and its reluctance to spend the necessary rehabilitation expenses then estimated at $565,000, subsequent yearly maintenance expenses of $200,000, and projected bridge replacement costs of $14 million in 1997.[3] BN notified us during that proceeding that the bridge closed.

No traffic has moved over WB subsequently. As noted, it has no rail service-related employees. There are no tariffs presently on file here by WB in its own name, nor any other indication of tariff-related WB service. Based on BN's representations and the two-year hiatus since *Pooling*, there is also some question if WB is safe and/or whether operations could safely resume. Accordingly, based on the existing record and other relevant information before us, I cannot conclude that WB is presently a carrier under the "holding out/able to perform" standards articulated in *Interstate*. The presented facts tend to indicate the opposite, and that WB has rremained more of a corporate shell than a railroad. Because our jurisdiction to authorize trackage rights here is dependent on WB's status, I believe we are necessarily compelled to stay the exemption and ask the parties to address the matter further.

As a matter of procedure, I object to the majority's division of issues before us into two separate decisions — stay and rejection issues here, and revocation issues in one subsequent. It is particularly inappropriate here, because all issues are necessarily related and jurisdictional. This particular trackage rights agreement is arguably outside the purpose of transactions contemplated by the class exemption. In my view, such trackage rights exemption necessarily implied a grant resulting from an agreement between arms - length bargainers, and,

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[3]Finance Docket No. 30581 (Sub-No. 1), BN V.S. Condon, pp. 4-6.

consequently, the existence of functioning, independent carriers.[4]

By contrast, the agreement here is an intracorporate grant of lengthy trackage rights by a parent to its wholly-owned, nonoperating, one-mile long subsidiary which has no equipment or rail-service employees; BN will necessarily supply all. With the exception of certain TOFC/COFC hubs, BN claims in its notice that the proposed WB operations are limited to garnering business for the line not presently handled by BN. However, paragraph 2(d) of the agreement itself indicates that BN can expand WB's operations at any time. This is obviously not a typically bargained, two-sided trackage rights arrangement between carriers.[5]

Accordingly, one cannot help but glean from the record the obvious possibilities: BN intends to use the trackage rights and WB's corporate shell to transfer increasing levels of its present operations on the line to WB. BN claims a transportation intent and purpose underlying the transaction to become more competitive vis-a-vis certain traffic. However, at the same time, BN openly states that it attempted to secure certain labor concessions by negotiations and, failing that, constructed the BN-Winona arrangement. Significantly, BN further acknowledges that if labor concessions are achieved, Winona will not commence operations.[6]

Appropriate as it may be to reduce its operating labor costs by negotiations under the RLA, attempts to avoid consequences of past or current negotiations through the ICA pro-

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[4]See Ex Parte No. 282 (Sub-No. 9), *supra*.

[5]Compare the intracorporate exemption at 49 CFR 1180.2(d)(3), originally adopted in Ex Parte No. 282 (Sub-No. 3), *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980).

[6]See letter dated December 2, 1987 provided to the Commission by BN and made part of the record in this case.

cess undercuts the transportation motive, replacing it with a labor relations intent and purpose to discipline labor in a manner not achieved in the context of RLA collective bargaining. The availability of ICA transactions in such circumstances must be evaluated in light of accommodating and reconciling the purposes of the respective Acts, which, I hasten to add, in my view are not necessarily inconsistent.

Finally, it is in this sense that the transaction poses issues similar to those present in the *Guilford-Springfield Terminal* cases.[7]

This exemption should be stayed pending further investigation and development of the record.

COMMISSIONER SIMMONS, dissenting:

I believe that the Commission should have stayed this transaction on its own motion and set the proceeding for notice and comment. Given the wider implication of this proposal, the Commission has a responsibility to determine whether it comports with our findings in Ex Parte No. 282 (Sub-No. 9). Moreover, the arrangement, at least insofar as its impact on current employees is concerned, appears to present issues similar to the current proceeding in Finance Docket No. 30925, *Boston and Maine Corp. — Lease and Trackage Rights — Springfield Terminal Railway Co.*

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[7]Finance Dockets Nos. 30965, et al., *Delaware and Hudson Railway Company — Lease and Trackage Rights Exemption — Springfield Terminal Railway Company.*

APPENDIX D

SERVICE DATE
MAR 7 1988

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 31163

WINONA BRIDGE RAILWAY COMPANY — TRACKAGE RIGHTS — BURLINGTON NORTHERN RAILROAD COMPANY

Decided: February 26, 1988

Winona Bridge Railway Company (WB), a wholly owned subsidiary of the Burlington Northern Railroad Company (BN), filed a notice of exemption under 49 CFR 1180.2(d)(7) and 1180.4(g)(2) for its acquisition of bridge trackage rights over approximately 1,860 miles of BN line between Winona Junction, WI, and Seattle, WA. The trackage rights agreement became effective on November 25, 1987. The notice of exemption was served and published in the *Federal Register* on December 4, 1987 (52 F.R. 46129).

The Railway Labor Executives' Association (RLEA) petitioned to void or revoke the exemption. M. M. Winter, General Chairman for the United Transportation Union (UTU), petitioned to revoke or reject it, and the Brotherhood of Locomotive Engineers (BLE) petitioned for revocation. WB replied to the RLEA and UTU petitions. By decision served January 7, 1988, the Commission declined to reject and stated that the revocation requests would be considered in a subsequent decision after WB had an opportunity to respond.[1]

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[1]Thereafter, UTU petitioned to reopen and supplement its prior petition, and RLEA petitioned to reopen this proceeding and reconsider the January 7th decision. These petitions will be considered in the subsequent decision on the merits of the revocation requests.

DISCUSSION AND CONCLUSIONS

UTU has failed to justify a stay under the requisite stay criteria set forth in *Washington Area Transit Comm'm v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Under these criteria, a petitioner must show: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm in the absence of a stay; (3) that the stay would have little adverse effect on the carrier; and (4) that the public interest supports a stay. *See Commonwealth — Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983); and *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 973 (D.C. Cir. 1985).

UTU claims that it is likely to prevail on judicial review. We disagree. UTU merely repeats its former arguments: that WB is not a carrier within the meaning of 49 U.S.C. 11343 and the Commission's exemption regulations; and that the transaction is merely an attempt to circumvent BN's labor contracts. We explored these arguments in our January 7th decision and found that the evidence and arguments then before us were unconvincing and did not warrant the extraordinary step of rejecting WB's application in advance of the revocation hearing called for in our rules. The Commission accepted WB's carrier status at this juncture and noted that disclosure of the motivation underlying the transaction is not required by the class exemption procedures. Moreover, the January 7th decision is not ripe for review because the Commission at this time has neither ruled on the pending revocation and reopening requests nor considered WB's response to the labor unions' arguments.

UTU is in reality seeking affirmative action — the prohbition of a previously exempted transaction rather than the stay of agency action about to take place. The Commission adopted section 1110.2(d)(7) in *Railroad Consolidation Procedures* —

Track Rts. Exempt., 1 I.C.C. 2d 270 (1985) (*Track. Rts.*) and in so doing declined to require a preconsummation hearing. Instead, a post-consummation revocation proceeding was adopted for the correction of abuses. The exemption procedures were affirmed in *Illinois Commerce Comm'n v. I.C.C.*, 819 F.2d 311 (D.C.Cir. 1987). UTU's attempt to stay this already effective exemption transaction constitutes a collateral attack both on the exemption procedures and the court's affirmance of them.

UTU argues that, if the Commission's January 7th decision is vacated and set aside on judicial review, and the notice of exemption is ultimately found invalid, BN employees will be irreparably harmed. Specifically it asserts that wages or benefits lost by employees in the interim could not be restored. The evidence does not support this contention.

WB indicated in its notice of exemption that it would target only new TOFC/COFC business and not existing BN traffic. Further, it indicated that BN's plant would be used during off peak hours to minimize any possible effect on current BN employees. There is no reason to disregard these representations in advance of a ruling on the revocation and reopening requests. Moreover, the current employees are not without labor protection. To the contrary, the Commission imposed standard trackage rights labor protection conditions on this transaction.[2] On the basis of evidence, it cannot be found that WB's commencement of operations prior to completion of judicial review will cause irreparable harm to employees.

On the other hand, a stay would cause WB and the shipping public substantial harm. WB would be prevented from

[2]The Commission imposed the protections set forth in *Norfolk and Western Ry. Co. — Trackage rights — BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc., — Lease and Operate*, 360 I.C.C. 653 (1980).

promptly instituting a competitive new service, and the public would be denied the benefits of that service. UTU offers no support for its assertions to the contrary.

Finally, the public interest does not favor a stay. Congress intended the Commission's exemption power to be "an important cornerstone of a new, flexible approach to regulating the rail industry." *Simmons v. I.C.C.*, 697 F.2d 326, 333 (1982). The Commission found in *Track. Rts., supra,* that regulation of these trackage rights transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a and that the public interest favors exemption of these transactions. Imposing a stay would deny the Commission, the railroads, and the shipping public the very flexibility that Congress intended to confer.

This action will not signifcantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simons and Lamboley. Commissioners Simmons and Lamboley dissented with separate expressions.

(SEAL)

Noreta R. McGee
Secretary

COMMISSIONER SIMMONS, dissenting:

Based on the limited facts presented in this case, I would have granted the petition for stay. At least on its face, there does not appear to be any operational reason for this trackage rights agreement other than to avoid current labor contracts. Given our statutory responsibility to ensure fair arrangements for employees affected in Commission approved transactions, a stay is warranted. Furthermore, it appears that the trackage rights arrangement here and its impact on employees present issues similar to the proceeding in Finance Docket No. 30965, *Delaware & Hudson Railway Company Lease and Trackage Rights — Springfield Terminal Railway Company,* (served February 19, 1988).

COMMISSIONER LAMBOLEY, dissenting:

I would grant the request for stay. For reasons previously explained[1] I believe the issues raised by this transaction warrant further investigation and review before Winona Bridge (WB) is properly termed a "carrier" and whether, in their-cumstances, the BN-WB intracorporate transaction falls within the scope of the specific trackage rights class exemption[2] asserted.

Likewise, the question whether the BN-WB transaction is an attempt to avoid obligations under the RLA[3] or to existing collective bargaining agreements is a critical issue clearly

[1]See my separate expression in the decision served January 7,1988, which denied requests by RLEA, UTU and BLE to reject the exemption.

[2]49 CFR 1180.2(d)(7) and 110.4(g)(2) see Ex Parte No. 282 (Sub-No. 9), *Railroad Consolidation Procedures — Trackage Rights Exemption,* 1I.C.C. 2d 270 (1985).

[3]45 U.S.C. Section 151 *et seq.*

framed by evidence of BN's letter dated December 2, 1987. For if true, the transaction would present no legitimate transportation purpose, but essentially only a labor relations purpose. Thus, it is dubious whether BN-WB may invoke ICA exemption procedures to displace RLA obligations, with or without accommodating conditions.[4] The likelihood of petitioners success on review cannot be easily dismissed.

Indeed, issues in this transaction bear striking similarity to those in *Springfield Terminal*.[5] In my view, the lack of an adequate record on the key issues in this case compel us to stay and further investigate the transaction.

Additionally, other aspects of this decision are troubling. The majority's conclusion that attempts to seek stay of the transaction are barred because such constitute an improper collateral attack on court-affirmed class exemption procedures is, in my view, not only patently wrong, but should be considered clearly arbitrary and erroneous as a matter of law.

The relief here sought by petitioners is stay pending judicial review of a Commission decision served January 7, 1988. The APA expressly authorized such relief, pending judicial review of an agency decision.[6] The Commission rules themselves so provide.[7]

The majority's reliance on judicial precedent affirming the class exemption is misplaced, since that case is clearly

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[4]*See e.g. RLEA v. P&LE*, 831 F.2d 1231 (3rd Cir. 1987); on remand *RLEA v. P&LE*, (WD. Pa) memorandum opinion filed November 24, 1987, appeal pending 3rd Circuit Case No. 87-3797. and FD Nos. 30965, et al., *Delaware and Hudson Railway Co., — Lease and Trackage Rights Exemption — Springfield Terminal Railway Company* (not printed), served February 19, 1988.

[5]Finance Docket No. 30965, *et al. supra*, Footnote 4.

[6]5 U.S.C. Section 705.

[7]49 CFR Section 1115.5. See also Section 1117.

distinguishable and inapposite on the present issues.[8] Moreover such a holding merely attempts to "lock-in" the class exemption for all circumstances and preclude a more timely evaluation in specific cases.

Further, in an attempt to avoid the clear authority for relief pending review, the majority asserts a "ripeness" issue, i.e., petitions to reopen have been filed and are pending before the agency. However, bifurcation and delay of decision on pleadings at issue in order to declare in a separate decision that the matter is not ripe for judicial review is tantamount to abuse of administrative discretion and process.

Moreover, it is contrary to Commission rules which expressly authorize such relief pending action on "requests to reopen"[9] as well as recent agency precedent in the *Springfield Terminal* cases in which stay orders were issued to enjoin consummation of leases and trackage rights under claim of class exemption.[10]

The majority's analysis and conclusions regarding an alleged transaction intent to target only *new* TOFC/COFC traffic for off peak service simply defies logic and credibility.

Finally, without more information for the majority to conclude that protective conditions presently prescribed under the class exemption are sufficiently adequate to ameliorate employment security and displacement problems that may exist in trackage rights and operations over some 1860 miles

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[8]See *Illinois Commerce Com'n v. ICC*, 819 F.2d 311 (D.C. Cir. 1987).

[9]See 49 CFR Section 1115.3, 1115.4, also 1115.5, also 49 U.S.C. Section 10324 and Section 10327.

[10]See Finance Docket No. 30965, *et al.*, decision served October 26, 1987 (not printed) in Nos. 30965, 30972, 31003, 31101, 31115, and 31125 reaffirmed by decision served December 18, 1987 (not printed).

of rail lined seems to consciously ignore the recent experiences and decisions in the Springfield Terminal cases.[11]

[11]As a matter of administrative law and procedure, denial of stay under the class exemption itself may violate minimum requirements of fundamental fairness and due process when it can be shown that post-consummation procedures may well prove inadequate or inappropriate. See Finance Docket No. 30965, et al., *Springfield Terminal* cases, *supra*.

APPENDIX E

STATUTES INVOLVED

5 U.S.C. 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

28 U.S.C. 2344:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.
> .....

49 U.S.C. 10505:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this sub-

chapter, the Commission shall exempt a person,class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle —

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (b) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

* * * * * *

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy to section 10101a of this title.

49 U.S.C. 11343:

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

* * * * * * *

(6) acquisition by a rail carrier of trackage rights over, or joint ownerhsip in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

49 U.S.C. 10327(g)(1):

> The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances —
>
> (A) reopen a proceeding;
>
> (B) grant rehearing, reargument, or reconsideration of an action of the Commission; and
>
> (C) change an action of the Commission.
>
> An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

49 U.S.C. 10327(i):

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

(2)

No. 88-256

In the Supreme Court of the United States

OCTOBER TERM, 1988

M.M. WINTER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Assistant Attorney General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel
JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel
CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

29 pp

QUESTIONS PRESENTED

1. Whether a decision of the Interstate Commerce Commission is nonfinal, and therefore nonreviewable, when the party seeking judicial review has petitioned the Commission to reopen its decision.

2. Whether the Commission's initial decision to accept a railroad's notice of a trackage rights transaction that is exempt from Commission regulation, subject to later proceedings to determine whether to revoke the exemption, is a reviewable order.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 851 F.2d 1056. The January 7, 1988, order of the Interstate Commerce Commission denying petitioner's petition for rejection of the exemption for the Winona Bridge Railway Company trackage rights filing (Pet. App. 20a-29a), and the March 7, 1988, order of the Commission denying a stay pending judicial review (Pet. App. 30a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1988. The petition for a writ of certiorari was filed on August 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the court below erred in holding that a decision of the Interstate Commerce Commission was not a final and reviewable order because petitioner had a pending petition to reopen the Commission's decision, and because petitioner was challenging the Commission's initial acceptance of a trackage rights exemption filing that was subject to later, and more extensive, revocation proceedings.

1. On November 16, 1987, the Winona Bridge Railway Company (Winona) agreed to acquire certain "bridge" trackage rights from its parent company, Burlington Northern Railroad Company (Burlington), which would permit Winona to operate over approximately 1,860 miles of Burlington line between Winona Junction, Wisconsin and Seattle, Washington without serving customers along the route (Pet. App. 2a-3a, 20a). A trackage rights agreement is an arrangement between rail carriers that permits one carrier to conduct operations over tracks owned by another (Pet. App. 3a & n.4). Under the Interstate Commerce Act (49 U.S.C. (& Supp. III) 10101 *et seq.*), the Commission ordinarily must find that an acquisition of trackage rights is "consistent with the public interest" and must approve it before the transaction becomes effective (49 U.S.C. 11343(a)(6), 11344). In 1980, however, Congress directed the Commission in the Staggers Act to "exempt" from regulation transactions that otherwise require approval under the Interstate Commerce Act when the Commission finds that regulation is not necessary to carry out national rail transportation policy and certain other conditions are met (*id.* at 10505(a)).[1] Acting under that

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[1] Congress established two statutory criteria for exemption of a "transaction" from a provision of the Interstate Commerce Act (49 U.S.C. 10505). The Commission must find that applying the provision

authority, the Commission has exempted trackage rights agreements (with certain exceptions not relevant here) from the general requirement of advance approval by the Commission.[2] *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C. 2d 270 (1985) (promulgating 49 C.F.R. 1180.2(d)(7) and 1180.4(g)(2)). The Commission's trackage rights exemption was upheld in *Illinois Commerce Commission* v. *ICC*, 819 F.2d 311 (D.C. Cir. 1987).

Because of the trackage rights exemption, a railroad may implement a trackage agreement seven days after the railroad files a verified notice of it with the Commission containing specified information about the transaction (49 C.F.R. 1180.4(g)(1)). Interested parties may challenge exempt trackage rights agreements, however, by filing a petition to revoke the exemption, and the Commission may revoke the exemption "when it finds that application of [the Interstate Commerce Act] * * * is necessary to carry out the transportation policy of section 10101a of [title 49]" (49 U.S.C. 10505(d)). By regulation, "[t]he filing of a petition to revoke * * * does not stay the effectiveness of an exemption" (49 C.F.R. 1180.4(g)(3)).

2. On November 18, 1987, Winona filed a notice with the Commission of its exempt trackage rights arrangement with Burlington (Pet. App. 6a, 20a). On November 25,

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to the transaction "(1) is not necessary to carry out the transportation policy" set forth in 49 U.S.C. 10101a; and "(2) either (A) the transaction * * * is of limited scope, or (B) the application of [the provision in question] is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a).

[2] The exemption covers the "[a]cquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings" (49 C.F.R. 1180.2(d)(7)).

1987, the trackage rights agreement became effective (*ibid.*).[3] On December 2, 1987, petitioner, the General Chairman of the United Transportation Union (UTU), which represents certain of Burlington's employees, filed a petition seeking either rejection of the Winona filing or revocation of the exemption, or both (*id.* at 7a.).[4] Petitioner argued, inter alia, that Winona was not a rail carrier for which the trackage rights exemption was available because Winona was allegedly an out-of-service railroad bridge, not a "person providing railroad transportation for compensation" pursuant to 49 U.S.C. 10102(20) (Pet. App. 7a, 22a).

On January 7, 1988, the Commission denied petitioner's threshold request to reject the Winona exemption notice (Pet. App. 20a-29a). The Commission considered petitioner's contentions that Winona "does not provide, and has never provided, transportation," but found that petitioner "has not presented any evidence to permit us to resolve definitively" Winona's status on the record before it (*id.* at 24a). The Commission added that "in the interests of addressing [petitioner's] petition[], we have not waited for replies" from Winona and Burlington, but nevertheless noted that Winona "could be found to have a residual common-carrier obligation" (*ibid.*). The Commission thus denied the petition to reject Winona's notice, but deferred its ruling on the request for revocation of the exemption. The Commission expressly left to a later decision, after "Winona has had an opportunity to respond," the con-

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[3] The Commission served the notice of exemption and published it in the Federal Register on December 4, 1987 (52 Fed. Reg. 46129) (Pet. App. 20a).

[4] On November 25, 1987, the Railway Labor Executives' Association (RLEA) had filed a separate petition to void, revoke or stay the exemption (Pet. App. 6a). The Brotherhood of Locomotive Engineers filed a third petition for revocation (*id.* at 21a).

sideration of "the merits of petitioners' revocation requests" (*ibid.* (emphasis added)).[5]

On January 19, 1988, petitioner filed a petition with the Commission to reopen its January 7th decision (Pet. App. 2a). Before the Commission had acted on that petition, on February 17, 1988, petitioner also sought judicial review of the Commission's January 7th decision in the court of appeals (Pet. 5). Petitioner's union, the UTU, also requested that the Commission stay Winona's exemption pending judicial review, and the Commission denied that request on March 7, 1988 (Pet. App. 30a-33a). In its opinion denying a stay, the Commission stated that UTU was not likely to prevail on judicial review, and added (*id.* at 31a): "[m]oreover, the January 7th decision is not ripe for [judicial] review because the Commission at this time has neither ruled on the pending revocation and reopening requests nor considered [Winona's] response to the labor unions' arguments."[6]

3. On May 13, 1988, the court of appeals dismissed petitioner's petition for review "for want of a final order" (Pet. App. 19a).[7] In its opinion, filed on July 12, 1988, the

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[5] Vice Chairman Lamboley dissented and would have stayed the exemption pending development of the record (Pet. App. 25a-29a). Commissioner Simmons also dissented. He would have stayed the transaction between Winona and Burlington and instituted notice and comment proceedings (*id.* at 29a). Neither dissent argued that the Commission should have rejected Winona's filing on the record before it.

[6] The Commission also concluded that Burlington employees would not be irreparably harmed even if the January 7th decision were set aside on judicial review, whereas a stay would cause substantial harm to Winona and the shipping public and was not in the public interest (Pet. App. 32a).

[7] The court also vacated a stay of the Commission's action that it had granted earlier (Pet. App. 19a).

court explained that it was "convinced that under the circumstances of this case," this Court's decison in *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), "stands for the proposition that once the unions filed petitions to reopen and to revoke the exemption, the original *January 7 Decision* became nonfinal" and, therefore, not subject to judicial review (Pet. App. 12a (emphasis in original)).

The court also held that the Commission's January 7th order was not reviewable because it was not a final administrative decision on the trackage rights transaction. Citing *Papago Tribal Utility Auth.* v. *FERC*, 628 F.2d 235 (D.C. Cir.), cert. denied, 449 U.S. 1061 (1980), the court stated that "[t]he decision to accept a filing * * * merely initiates the administrative process" and it "decides nothing about the merits of the case" (Pet. App. 13a). The court observed that the acceptance of the filing "is quickly made without time for considered judgments on the law or the facts, and gives the reviewing court no factual record to examine" (*ibid.*). Judicial review of that preliminary action would be "cumbersome and inappropriate" because it would force the court to decide "without the benefit of the Commission's views on relevant question[s] of law and regulatory policy" (*ibid.*). The court thus concluded that it was "bound by the doctrine of finality and the statutory scheme of the Staggers Act, which provides for challenges to the Commission's actions through revocation proceedings after the transaction has been consummated" (*id.* at 14a).

The court also rejected the argument that it could invoke the All Writs Act, 28 U.S.C. 1651, to review the otherwise non-final order before it (Pet. App. 16a). The court recognized that "[j]urisdiction must be clearly lacking to justify issuance" of an extraordinary writ, and this case did not satisfy that exacting standard (*id.* at

16a-17a). The court concluded that the Commission's denial of the petition to reject Winona's exemption did "not constitute a clear abuse of discretion or usurpation of power" (*id.* at 17a).

One member of the panel dissented, finding it "inescapably clear" on "the information presented to the Commission," that Winona was not a rail carrier, but rather was the "owner of a defunct * * * river bridge" (Pet. App. 17a). Without discussion of the interim nature of the order before it or the pending petition for the Commission to reopen its January 7th decision, the dissent expressed the view that there was a "clear jurisdictional defect" warranting relief (*id.* at 18a).[8]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. This Court's recent decision in *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), establishes that the filing of a petition to reopen an agency decision makes that decision nonfinal for purposes of judicial review. In *Brotherhood of Locomotive Engineers,*

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[8] The Commission is actively deliberating about petitioner's petitions to reopen its January 7th order and to revoke Winona's exemption. Although Winona's exemption is administratively effective at present, a district court has enjoined the consummation of the trackage rights agreement on the ground that it violates the Railway Labor Act, 45 U.S.C. 101 *et seq. Burlington Northern R.R. Company* v. *United Transportation Union International*, No. 88 C 2687 (N.D. Ill. filed June 13, 1988), appeal pending, No. 88-2180 (7th Cir. argued Sept. 9, 1988).

a union sought judicial review of two Commission orders: the first, the Commission's denial of a petition for "clarification" of a final order, and the second, the Commission's denial of a petition for "reconsideration" of the first denial on grounds that it was materially incorrect. The Court held that neither order before it was reviewable (slip op. 9, 13). The Court first explained that "[w]ith certain exceptions that are not relevant here, judicial review of final orders of the ICC is governed by the Hobbs Act, which provides that any party aggrieved by 'a final order' of the Commission 'may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies' " (*id.* at 5 (citations omitted)).[9] The Court then held that the Commission's denial of a petition for reconsideration is not a reviewable order under the Hobbs Act, when the petition simply argues that the original decision was materially incorrect (slip op. 5-9). The Court reasoned that an appeal from the denial of such a timely-filed petition for reconsideration "serves no purpose whatever * * * since in that situation the petition tolls the period for judicial review of the original order, which can therefore be appealed to the courts *directly* after the petition for reconsideration is denied" (*id.* at 7-8) (emphasis in original).

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[9] The Hobbs Act, 28 U.S.C. 2341 *et seq.*, provides that "the court of appeals * * * has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (5) all * * * final orders of the Interstate Commerce Commission made reviewable under section 2321 of this title" (28 U.S.C. 2342(5)). Any "party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies" (28 U.S.C. 2344). 28 U.S.C. 2321(a) provides that "a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the [Commission] shall be brought in the court of appeals" in accordance with the Hobbs Act.

The Court further considered the language of the Interstate Commerce Act providing that an order is "final on the date * * * served," and that, "notwithstanding" the Commission's power to reopen its orders, "a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date" (slip op. 12 (citing 49 U.S.C. 10327(i)). The Court rejected the argument that those provisions make a Commission order reviewable despite a pending request for reconsideration (slip op. 12-13).[10] Although those provisions "would seem to mean that the pendency of reconsideration motions does not render Commission orders nonfinal for purposes of triggering the Hobbs Act limitations periods" (*ibid.*), the Court found no basis for interpreting the Hobbs Act differently from the similar provision of the Administrative Procedure Act (5 U.S.C. 704) that an order "otherwise final is final [for purposes of review] * * * whether or not there has been presented or determined an application for * * * any form of reconsideration" (slip op. 12-13). The Court stated that the APA's "language has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review * * * but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal" (*id.* at 13 (emphasis in original)). The

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[10] The Court had to reach this argument to determine whether the union had made a timely request for review of the Commission's refusal of its "petition for clarification" (slip op. 12). Because more than 60 days had elapsed since the denial of clarification, if that order had been "final," and thus reviewable, regardless of the petition for reconsideration, the union's petition for judicial review of it would have been untimely (*ibid.*).

Court found the same doctrine applicable to the Hobbs Act (*ibid.*).[11]

The Court's logic in *Brotherhood of Locomotive Engineers* compels the conclusion that the court of appeals drew in this case. Just as in *Brotherhood of Locomotive Engineers*, petitioner's request for reopening in this case "tolls the period for judicial review of the original order," and enables it to "be appealed to the courts *directly*" when and if the Commission refuses to reopen. In the interim, petitioner's request to reopen plainly renders "the orders under reconsideration nonfinal." (*Brotherhood of Locomotive Engineers*, slip op. 13).[12] This result is consis-

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[11] Petitioner offers no basis for his suggestion (Pet. 11) that the Court's holding of "nonfinality" for purposes of the Hobbs Act's 60-day limitations period (28 U.S.C. 2344) does not apply with equal force to the requirement of finality for court of appeals review, established in another section of the Hobbs Act (28 U.S.C. 2342(5)). Indeed, it would be extremely incongruous if the same order were "final" for purposes of jurisdiction to seek judicial review but "nonfinal" for purposes of the 60-day limitations period. Petitioner's construction would make *no* limitations period applicable to a petition for judicial review of an order under reconsideration by the agency, contrary to the plain language of the statute providing a 60-day period within which to seek judicial review.

[12] Petitioner's reliance (Pet. 9) on *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985), offers petitioner no support, as that case involved only the dismissal of an appeal by a party who had mistakenly assumed that a final order was not ripe and therefore had delayed seeking review until after the statutory period had run, not one who sought both administrative and judicial review simultaneously.

Petitioner also relies (Pet. 10) on the current docketing statement of the United States Court of Appeals for the District of Columbia Circuit as evidence that the ruling below is inconsistent with "settled practice" (*ibid.*). The information sought by the docketing statement about pending requests for reconsideration simply enables the court to determine whether it lacks jurisdiction because the order on appeal is not final.

tent with the settled practice of the courts of appeals. See *Texas* v. *United States*, No. 86-4430 (5th Cir. July 2, 1986) (per curiam); *C.O.D.E., Inc.* v. *ICC*, 768 F.2d 1210, 1211-1211 (10th Cir. 1985); *Aeromar, C. Por. A.* v. *Dep't of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985); *Cities of Newark, New Castle & Seaford* v. *FERC*, 763 F.2d 533, 544, 545 (3d Cir. 1985); *California Tribal Chairman's Ass'n* v. *United States Dep't of Labor*, 730 F.2d 1289, 1290-1291 (9th Cir. 1984); *Cartersville Elevator, Inc.* v. *ICC*, 724 F.2d 668, 672, aff'd en banc, 735 F.2d 1059 (8th Cir. 1984); *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112, 1114-1115 (8th Cir. 1977).

The only basis that petitioner offers to distinguish *Brotherhood of Locomotive Engineers* is that "an agency decision may be final for one purpose yet nonfinal for another purpose" (Pet. 11), citing *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970). Petitioner's reliance on *American Farm Lines* is misplaced. In that case, the Court held that "[i]n multi-party proceedings, * * * some may seek judicial review and others may seek administrative reconsideration," resulting in the exercise of jurisdiction over the same order by both the court and the Commission (*id.* at 541). The Court recognized, however, that " '[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied' " (*ibid.*, quoting *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960)). This Court has never held that the same party may simultaneously pursue judicial review and agency reconsideration.[13] Indeed, to do so would

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[13] Petitioner's effort (Pet. 11) to distinguish *CAB* v. *Delta Airlines, Inc.*, 367 U.S. 316, 326 (1961), and *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960), has no merit. In *Delta Airlines*, the Court agreed with "the general notion that an administrative order is not 'final,' *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of" (*id.* at 326 (emphasis in original)).

invite premature judicial consideration of issues that the agency might well resolve, thereby increasing the burden on the courts and disrupting the orderly process of judicial review. See, *e.g.*, *Pennsylvania* v. *ICC*, 590 F.2d 1187, 1192-1194 (D.C. Cir. 1978); *B.J. McAdams, Inc.*, 551 F.2d at 1114-1115. Thus, the court below correctly concluded that the order from which petitioner appealed is not final.[14]

The Court simply found that principle inapplicable in determining whether the CAB could alter a certificate for an airline to operate that had become effective, without providing the hearing required by statute, because the CAB had made the certificate subject to its action on petitions to reconsider (*id.* at 321, 326-327). Moreover, the court in *Outland* made clear that "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied" (284 F.2d at 227). Accordingly, "when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon" (*id.* at 227-228).

[14] Petitioner's contention that the rules of the Commission "contemplate simultaneous petitions to reopen and petitions for judicial review" (Pet. 12) gives those rules an interpretation exactly contrary to their correct meaning. Section 1115.6 (49 C.F.R.) provides, in pertinent part, that "[i]f a[] * * * petition seeking reopening is filed * * * before or after a petition seeking judicial review is filed with the courts, the Commission will act upon the * * * petition after advising the court of its pendency unless action might interfere with the court's jurisdiction." The Commission's rule is fully consistent with the principle that a petition to reopen agency proceedings renders the agency's order nonfinal for purposes of judicial review. By "advising the court" of the petition, the Commission assists the courts in dismissing appeals of nonfinal orders. The Commission's further provision that it will not act when "action might interfere with the court's jurisdiction" simply implements this Court's discussion of the relationship between agency action and judicial review in *American Farm Lines*, 397 U.S. at 541. There, the Court stated that the issuance of temporary relief by a court "does not mean that the Commission loses all jurisdiction to complete the administrative process. It does mean that thereafter the Commission 'is without power to act inconsistently with the court's jurisdiction' " (*ibid.*, quoting *Inland Steel Co.* v. *United States*, 306 U.S. 153, 160 (1939)).

2. Petitioner also argues (Pet. 13-14) that the Commission's initial decision not to reject Winona's filing was a reviewable order, despite the preliminary nature of the ruling and the continuation of revocation proceedings before the Commission. The Commission's refusal to reject Winona's filing, however, is plainly nonreviewable. Allowing judicial review of such an order would be inconsistent with the regulatory scheme, and it would significantly disrupt the Commission's proceedings. Under the Commission's class exemption of all trackage rights transactions from regulation, a railroad is authorized to consummate trackage rights agreements without Commission approval, provided that it notifies the Commission in writing one week prior to consummation (49 C.F.R. 1180.4(g)). Congress has authorized the Commission to rely on its post-consummation revocation powers to nullify any transactions determined not to be entitled to an exemption (see 49 U.S.C. 10505(d)).[15] Because the trackage rights exemption is self-executing, the Commission's decision not to reject Winona's filing merely started the administrative process, not ended it. The decision, therefore, lacks the qualities of administrative finality needed for judicial review. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239 (1980) (issuance of an administrative complaint is not final agency action).

In addition, Congress intended that the Commission exercise its exemption power to relax "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers" and "adopt a policy of reviewing carrier actions *after the fact* to correct abuses of market

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[15] See *Illinois Commerce Commission* v. *ICC*, 819 F.2d at 315-316; *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1119-1120 (5th Cir. 1981). The court below recognized this policy (Pet. App. 6a).

power." H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980) (emphasis added)). Treating the threshold action of the Commission as a final, reviewable decision would reverse the approach Congress had envisioned and would subject initial Commission decisions, based on incomplete records, to full scale judicial review that would pre-empt the Commission's revocation proceedings. There is no basis for finding finality in these circumstances under the decisions of this Court. See, *e.g.*, *Williamson Co. Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193 (1985) ("the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"); *Bell* v. *New Jersey*, 461 U.S. 773, 779-780 (1983) (administrative decision is not final when "judicial review at the time will disrupt the administrative process"); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (finding finality where "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication" and "rights or obligations have been determined or legal consequences will flow from the agency action").

Contrary to petitioner's contention (Pet. 13), the court of appeals properly analogized this case to *Papago Tribal Utility Auth.* v. *FERC*, 628 F.2d 235 (D.C. Cir. 1980), cert. denied, 449 U.S. 1061 (1980).[16] In that case, the court of appeals held that an agency's denial of a motion to

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[16] *Papago* itself followed this Court's precedents that the Commission's decision to accept or reject a rate filing is not judicially reviewable. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 441 U.S. 444 (1979) (Commission decision not to suspend a proposed rate increase is not reviewable); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) (courts have no power to suspend railroad rates pending a hearing before the Commission).

reject a rate increase filing with the FERC was not reviewable. FERC's decision not to reject a rate filing closely resembles the Commission's instant decision not to reject a trackage rights notice. Just as the filer in *Papago* could impose a higher rate (after a statutory waiting period), the railroad in this case may consummate a trackage rights arrangement after notifying the Commission. In both cases, judicial review must await the plenary post-consummation proceedings of the agency.

Petitioner suggests (Pet. 13-14) that, even if the Commission's order was not final, the court below erroneously concluded that there was no patent jurisdictional defect in the Commission's refusal to reject Winona's filing. Petitioner's argument (Pet. 14) is that the Commission lacks jurisdiction to authorize the trackage rights under 49 U.S.C. 11343(a)(6) because Winona is not a bona fide carrier. But on the record before it, the court below correctly determined that the Commission's action "does not constitute a clear abuse of discretion or usurpation of power" (Pet. App. 17a). There was ample basis for the court to conclude that the issuance of an extraordinary writ was unwarranted.[17] *In re State of South Dakota*, 692 F.2d 1158, 1160 (8th Cir. 1982) (citing *Ex parte Chicago, Rock Island & P. Ry.*, 255 U.S. 273, 274-276 (1921)). In any event, that fact-bound conclusion does not warrant further review by this Court.

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[17] The court noted that earlier Commission decisions discussing Winona's status as a carrier were "contradictory" and that there was no "well-developed factual record" for the Commission to use in making "its initial decision" (Pet. App. 17a).

CONCLUSION

The petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

CHARLES F. RULE
Assistant Attorney General

ROBERT S. BURK
General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

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(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M.M. WINTER,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BURLINGTON NORTHERN RAILROAD COMPANY AND WINONA BRIDGE RAILWAY COMPANY

Of Counsel:
EDMUND W. BURKE
DOUGLAS J. BABB
ARTHUR R. ZAEGEL
BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JANICE BARBER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Respondent Burlington Northern Railroad Company

THOMAS W. SPENCE
THOMAS W. SPENCE LAW OFFICE
Degree of Honor Building
325 Cedar Street
St. Paul, Minnesota 55101
(612) 223-8000
Attorney for Respondent Winona Bridge Railway Company

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QUESTIONS PRESENTED

1. May a court of appeals review agency action when petitions for reconsideration of that action are pending before the agency?

2. Is an agency's acceptance of a facially sufficient exemption notice subject to review by the court of appeals?

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BRIEF IN OPPOSITION OF RESPONDENTS BURLINGTON NORTHERN RAILROAD COMPANY AND WINONA BRIDGE RAILWAY COMPANY

Respondents Burlington Northern Railroad Company ("BN") and Winona Bridge Railway Company ("WB") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINION BELOW

The opinion of the court of appeals is reported at 851 F.2d 1056 and is reprinted in the Appendix to the Petition ("Pet. App.") at pages 1a-18a.

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[1] BN and WB participated in the proceeding below as intervenors in support of respondents the Interstate Commerce Commission ("ICC" or "Commission") and the United States. The listing of their corporate affiliations pursuant to Rule 28.1 is provided as Appendix A to this brief.

STATEMENT OF THE CASE

The petition in this case arises from a pending ICC proceeding regarding a grant of trackage rights to WB by BN, its corporate parent. While pursuing his claims before the Commission, petitioner simultaneously sought to challenge the WB trackage rights in the court of appeals. The court below held it lacked jurisdiction to review the particular ICC order petitioner challenged, in that it was not final agency action subject to appellate review. The lower court thus refused to intercede in the ongoing agency proceeding, leaving to the Commission the initial resolution of petitioner's claims regarding the validity of the WB trackage rights under the Interstate Commerce Act.

This case arose under streamlined procedures established by the ICC for authorizing trackage rights transactions between rail carriers. *See Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 819 F.2d 311 (D.C. Cir. 1987). Under those procedures, carriers that have entered into a written trackage rights agreement may implement the transaction seven days after they file a "notice of exemption" with the ICC. Implementation is subject to mandatory conditions guaranteeing employees of either carrier that are adversely affected by the transaction their full salary and fringe benefits for six years. *See* 49 C.F.R. § 1180.2 (d) (1987).[2] Moreover, the exemption may be revoked by the ICC, in whole or in part, upon a showing that it is contrary to the public interest. *See Railroad Consolidation Procedures*, 1 I.C.C.2d at 280, 281.

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[2] The labor protective conditions imposed on such transactions are those formulated by the Commission in *Norfolk & Western Railway—Trackage Rights—Burlington Northern Railroad*, 345 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Railway—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

In an effort to attract new traffic to its underutilized line between St. Paul, Minnesota and Seattle, Washington, BN entered into an agreement granting WB the right to carry overhead traffic on that line.[3] WB filed a notice of exemption that became effective on November 25, 1987. Petitioner M.M. Winter and other representatives of BN employees then filed petitions requesting that the Commission reject the notice of exemption as void on its face or, in the alternative, revoke it.[4] The challengers' principal claims were (1) that BN's grant of trackage rights to WB would have a detrimental impact on BN employees; and (2) that the exemption was not applicable because WB was not a "carrier" under the Interstate Commerce Act.

On January 7, 1988, the ICC issued the preliminary decision at issue here. Pet. App. at 20a-29a (the *"January 7 Decision"*). The Commission held that the exemption notice was valid on its face, finding that WB had

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[3] "Overhead traffic" is traffic that moves over a line but neither originates nor terminates on it. Pet. App. at 3a n.4. Under the trackage rights agreement, WB is permitted to pick up and set out traffic moving between BN's intermodal hub centers at St. Paul, Spokane, and Seattle. *Id.* at 3a.

[4] Mr. Winter is the United Transportation Union's General Chairman for BN. The Railway Labor Executives' Association ("RLEA"), which intervened in support of petitioner in the court below, also challenged the WB trackage rights before the agency.

ICC regulations afford protestants several procedural vehicles for after-the-fact challenges to exempted transactions, all of which were pursued here by petitioner and RLEA. In submissions filed December 2, 1987, and November 25, 1987, respectively, petitioner and RLEA sought revocation of the exemption pursuant to 49 U.S.C. § 10505(d). At the same time, they requested that the notice of exemption be rejected as void. *See* Pet. App. at 21a. Subsequently, both petitioner and RLEA sought reopening of the Commission decision at issue here pursuant to 49 U.S.C. § 10327(g), which authorizes parties to seek the parallel remedies of "reopening, rehearing, or reconsideration" of ICC decisions.

been treated as a carrier in prior ICC proceedings and that the existing record would not support a contrary conclusion. *Id.* at 24a. Noting that WB had not yet had an opportunity to respond to petitioner's claims, the agency deferred decision on the requests for revocation of the exemption. *Id.*

Petitioner sought reopening of the *January 7 Decision.* Joint Appendix ("J.A.") 115. He also filed additional evidence in support of his petitions to revoke. *Id.* at 126-38, 167-68. Petitioner subsequently sought a stay of the "operation of the 'Notice of Exemption' " pending judicial review. *Id.* at 184. The ICC denied that stay, emphasizing that the *January 7 Decision* was "not ripe for review because the Commission at this time has neither ruled on the pending revocation and reopening requests nor considered WB's response to the labor unions' arguments," and that, in any event, petitioner had not shown that consummation of the trackage rights agreement would cause irreparable harm to employees. Pet. App. at 31a-32a. The petitions for reopening and revocation are pending before the ICC.[5]

On February 17, 1988, petitioner sought review of the *January 7 Decision* before the Eighth Circuit. In his

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[5] The case continues to be in active litigation before the Commission. On August 4, 1988, RLEA moved to supplement the ICC record with additional argument and evidence, including the decision below. On August 19, BN and WB responded, reasserting their rights to submit additional evidence on petitioner's claims in the event the Commission does not reject them. Petitioner has sought to strike that response and RLEA has sought to challenge the submission of any additional evidence by WB and BN.

Although ICC regulations permitted WB to exercise the trackage rights notwithstanding these ongoing agency proceedings, the transaction has not yet been consummated. Shortly after the Eighth Circuit dismissed the petition for review, the District Court for the Northern District of Illinois enjoined the transaction on Railway Labor Act grounds. *Burlington Northern Railroad v. United Transportation Union,* No. 88-C-2667 (N.D. Ill. June 6, 1988), *appeal docketed,* No. 2180 (7th Cir. June 10, 1988).

briefs, petitioner presented to that court the very issues still pending before the Commission. The Eighth Circuit, however, dismissed the petition for review on two independent grounds.

First, relying on this Court's decision in *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987) (*"BLE"*), the lower court held that, in light of the petitions to reopen and revoke, the *January 7 Decision* was not final and hence not subject to judicial review. Pet. App. at 10a-12a. The court of appeals was "convinced that under the circumstances of this case *Brotherhood of Locomotive Engineers* stands for the proposition that once [petitioner] filed petitions to reopen and to revoke the exemption, the *January 7 Decision* became nonfinal." *Id.* at 12a.

Second, the Eighth Circuit held that the ICC's refusal to reject the exemption notice was an action of a preliminary nature not subject to judicial review. *Id.* at 12a-14a. Relying on *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980), the court held that judicial review would be available after—but not until—the ICC has made a final determination, based on a fully developed record, regarding the challenges to the WB exemption. Pet. App. at 13a-14a.[6]

REASONS FOR DENYING THE WRIT

This case involves the routine application of settled principles as to the finality of administrative orders and their susceptibility to review in the courts of appeals. The Eighth Circuit's application of those principles presents neither a conflict among circuits nor an issue of national importance. This case accordingly does not warrant a grant of certiorari.

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[6] One member of the Eighth Circuit panel dissented from these jurisdictional holdings. He issued a brief opinion reaching the merits of the carrier status question now pending before the ICC. *See* Pet. App. at 17a-18a.

The Eighth Circuit correctly followed this Court's ruling in *BLE* on the finality of administrative decisions. Its decision is also consonant with the holdings of other courts of appeals that jurisdiction does not lie to review administrative decisions until motions for reconsideration have been resolved by the agency and that, in any event, preliminary agency decisions to accept regulatory filings are not reviewable.

Finally, the lower court's decision presents no valid concern regarding the allocation of authority between administrative agencies and the courts. The result produced by the decision below avoids undue judicial interference with ongoing administrative proceedings without depriving any party of the right to present its claims. It properly allows full development of the record and permits the agency to apply its expertise prior to judicial review.

I. THE EIGHTH CIRCUIT CORRECTLY DISMISSED THE PETITION FOR REVIEW UNDER *BLE*

The gravamen of petitioner's request for certiorari is that the Eighth Circuit's ruling is somehow inconsistent with this Court's decision in *BLE*. *See* Pet. at 9-12. But petitioner claims no actual conflict with the holding in *BLE*, suggesting only that the decision below is at odds with the "logical inferences" he draws from the case. *See id.* at 9. Those inferences, however, are not borne out by the Court's opinion. *BLE* squarely held that a petition for reopening or reconsideration of an agency decision renders that decision nonfinal for purposes of judicial review.

Petitioner bases his claim that the ICC's decision is a final order on language in 49 U.S.C. § 10327(i), which provides that "an action of the Commission . . . is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date." The effect of that provision on the

availability of judicial review was also at issue in *BLE*. The Court there held that section 10327(i)

> has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . *but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.*

107 S. Ct. at 2369 (emphasis modified; citations omitted). In so holding, the Court confirmed its prior determinations that an administrative order is not final for purposes of judicial review until outstanding petitions for agency reconsideration have been resolved.[7]

The Eighth Circuit applied that settled rule in this case. It noted that *BLE* "cited with approval various cases holding that petitions that are actually filed render the orders under consideration nonfinal." Pet. App. at 11a (citing *Black Ball*, 397 U.S. at 541; *Delta Airlines*, 367 U.S. at 326; and *Outland*, 284 F.2d at 227-28). The Eighth Circuit acknowledged the possibility that in some circumstances—such as multi-party proceedings—an agency decision might "be final for one purpose yet nonfinal for another purpose." Pet. App. at 12a. It nonethe-

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[7] *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970) ("where a motion for rehearing is in fact filed there is no final action until the rehearing is denied"); *see also CAB v. Delta Air Lines*, 367 U.S. 316, 326 (1961).

Petitioner argues that *Delta Air Lines* does not stand for the rule that a pending petition for reconsideration precludes judicial review. *See* Pet. at 11-12. However, the Court there specifically relied on the "general notion," developed by the courts of appeals, "that an administrative order is not 'final,' for the purposes of judicial review, until outstanding petitions for reconsideration have been disposed of." 367 U.S. at 326 (emphasis deleted) (citing *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), and *Braniff Airways, Inc. v. CAB*, 147 F.2d 152 (D.C. Cir. 1945)). Moreover, since *Delta Air Lines* the courts of appeals have repeatedly held they lack jurisdiction when a petition for reconsideration is pending before the agency. *See* note 9 *infra*.

less denied petitioner's request for review because "no cases hold that *the same party* may *simultaneously* seek both judicial and administrative review." *Id.* (emphasis added).[8] Nothing in *BLE* even suggests a contrary rule. Moreover, every circuit that has addressed the issue has concluded that a petition for reconsideration renders the action to be reconsidered nonfinal for purposes of judicial review.[9]

Petitioner contends that *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985), supports a contrary result. *See* Pet. at 9. However, *Eagle-Picher* dealt with a wholly different issue—whether a petition for judicial review filed outside the statutory period could be deemed timely. 759 F.2d at 912. Rejecting an argument that the sixty-day time limit should not be enforced because the petitioner believed its claims had not ripened within that period, the court of appeals observed that "petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909. No issue concerning the effect of a petition for reconsideration was involved.[10]

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[8] For this reason, petitioner's reliance on *Black Ball* is misplaced. *See* Pet. at 12. In *Black Ball* one party to an administrative proceeding sought agency reconsideration while another sought judicial review. 397 U.S. at 536. Here, as the court below observed, petitioner has sought both simultaneously.

[9] *See, e.g., Aeromar, C. Por. A. v. Department of Transportation*, 767 F.2d 1491, 1493-94 (11th Cir. 1985); *Selco Supply Co. v. EPA*, 632 F.2d 863, 866 (10th Cir. 1980) (Seymour, J., concurring), *cert. denied*, 450 U.S. 1030 (1981); *ECEE, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980); *Pennsylvania v. ICC*, 590 F.2d 1187, 1193 (D.C. Cir. 1978); *New York v. United States*, 568 F.2d 887, 893 (2d Cir. 1977); *Tiger International, Inc. v. CAB*, 554 F.2d 926, 931 n.10 (9th Cir.), *cert. denied*, 434 U.S. 975 (1977).

[10] Petitioner also relies on the docketing form used by the District of Columbia Circuit and on 49 C.F.R. § 1115.6 as evidence that judicial review and agency reconsideration may occur at the same time. *See* Pet. at 10, 12. Those contentions simply illustrate the paucity of support for petitioner's claims. The express policy of the

Far from creating a "chaotic situation," *see* Pet. at 9, the Eighth Circuit's holding that there is no review jurisdiction prior to the completion of agency proceedings guarantees the most efficient use of both judicial and administrative resources. Because agency reconsideration may render judicial review unnecessary, judicial resources will not be wasted. Litigants' resources also will be conserved because parties will not be called upon unnecessarily to file or respond to petitions for review. When it takes place, moreover, judicial review will be premised upon a complete record that the agency has had a full opportunity to develop and evaluate. *See Asarco, Inc. v. FERC*, 777 F.2d 764, 772 (D.C. Cir. 1985). The decision below thus promotes the sound administration of justice, and there is no occasion for further review by this Court.

II. THERE IS NO CONFLICT BETWEEN THE EIGHTH CIRCUIT'S DISMISSAL OF THE PETITION FOR REVIEW AND THE HOLDINGS OF THIS COURT OR OTHER COURTS OF APPEALS

The Eighth Circuit's alternative holding—that even apart from the pendency of reopening requests the refusal to reject the WB exemption notice was by its nature non-reviewable—similarly does not merit the attention of this Court.[11] As the lower court recognized, an agency's

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D.C. Circuit is that petitions for reconsideration render agency action nonfinal. *See, e.g., Outland*, 284 F.2d at 227. Its docketing form merely provides a means to ensure that it has jurisdiction (*i.e.*, that a motion for reconsideration has not been filed before the agency in the same action that has been brought before the court). Likewise, the regulation under which the ICC notifies the courts of appeals of pending petitions for reopening serves to prevent inadvertent federal court intervention in ongoing agency proceedings.

[11] Petitioner mischaracterizes the lower court's alternative holding as merely involving an examination of exceptions to the finality rule. *See* Pet. at 13. In fact, the lower court's holding in this regard constitutes an independent ground supporting its dismissal of the petition for review. *See* Pet. App. at 12a-15a.

refusal to reject a filing is generally not subject to judicial review. Pet. App. at 13a. The Eighth Circuit relied upon *Papago Tribal Utility Authority v. FERC*, 628 F.2d at 235, in which the District of Columbia Circuit properly concluded that the mere acceptance of a filing "is the *initiation* of an administrative proceeding; judicial review properly follows the *conclusion*" of that proceeding, at which protestants can raise "the same issues now posed for summary disposition." *Papago*, 628 F.2d at 240.

The *Papago* doctrine is based on *Arrow Transportation Co. v. Southern Railway*, 372 U.S. 658 (1963), and *Southern Railway v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). *See* 628 F.2d at 242. There thus can be no question that it conforms with the decisions of this Court. Moreover, all courts of appeals that have had occasion to address the question have adhered to the *Papago* doctrine.[12]

Petitioner's suggestions that *Papago* is somehow limited to "utility rate filings," Pet. at 4, or to tariff filings, *id.* at 13, are plainly without substance. The courts of appeals have consistently applied the same rule to actions under the Interstate Commerce Act.[13] They have done so, moreover, in cases involving applications for operating authority, which are similar to the trackage rights authority here at issue.[14]

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[12] *See, e.g., Maine Public Advocate v. FCC*, 828 F.2d 68 (1st Cir. 1987); *Public Utilities Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 628-30 (9th Cir. 1985); *Newark v. FERC*, 763 F.2d 533, 540-45 (3d Cir. 1985); *American Broadcasting Co. v. FCC*, 682 F.2d 25, 30-32 (2d Cir. 1982); *Aberdeen & Rockfish Railroad v. United States*, 664 F.2d 41 (5th Cir. 1981); *Mayne v. United States*, 13 Cl. Ct. 60, 63-65 (1987).

[13] *See Earth Resources Co. v. FERC*, 628 F.2d 234 (D.C. Cir. 1980); *see also Illinois Commerce Commission v. ICC*, 789 F.2d 951, 954 (D.C. Cir. 1986).

[14] *See Barnes Freight Line, Inc. v. ICC*, 569 F.2d 912 (5th Cir. 1978); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112 (8th Cir. 1977).

As the Eighth Circuit noted, *Papago* and the holdings of this Court upon which it is based do not depend on the specific statutory language or procedure involved, but rather reflect the practical difficulties of reviewing interlocutory actions without the benefit of a complete record and full agency consideration. Pet. App. at 13a; *see Papago*, 628 F.2d at 238-39. The court of appeals did, however, observe that application of *Papago* in this context would be consistent with "the statutory scheme of the Staggers Act, which provides for challenges to the Commission's actions through revocation proceedings after the transaction has been consummated." Pet. App. at 14a. The lower court also emphasized that this approach will not cause employees irreparable harm because they have the benefit of extensive labor protective conditions. *Id.* at 15a.

Petitioner's final contention—that *Papago* is inapplicable because it involved a factual question whereas this case involves jurisdiction, *see* Pet. at 14—will not withstand analysis. As the Eighth Circuit pointed out, the jurisdictional issue here turns on technical factual issues that fall within the agency's expertise and should be determined by it in the first instance. *See* Pet. App. at 14a-15a; *see also FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Burlington Northern, Inc. v. Chicago & North Western Transportation Co.*, 649 F.2d 556, 558-59 (8th Cir. 1981); *Marine Wonderland & Animal Park, Ltd. v. Kreps*, 610 F.2d 947, 950 (D.C. Cir. 1979). That conclusion reflects both the ICC's reliance on factual questions in addressing the carrier status issue and the state of the agency record at the time of the *January 7 Decision*. *See* Pet. App. at 24a.[15] The court below thus correctly held that this does not

[15] Even one of the Commissioners who dissented from the *January 7 Decision* agreed that further development of the record would be required before WB could be held to lack carrier status. Pet. App. at 25a-29a.

fall within that narrow category of cases in which refusal to reject turns on purely legal issues. *Id.* at 14a.

The Eighth Circuit's reliance on *Papago* does not merit this Court's review. It reflects a settled and sensible allocation of judicial resources, based on a close analysis of the statutory scheme and a reasoned determination that denying premature review would not harm petitioner or the employees whose interests he represents. *See id.* at 14a-15a. On this ground as well as in its reliance on *BLE*, the court below simply applied established law, and petitioner has failed to demonstrate any basis for review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
EDMUND W. BURKE
DOUGLAS J. BABB
ARTHUR R. ZAEGEL
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JANICE BARBER
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Respondent Burlington Northern Railroad Company

THOMAS W. SPENCE
THOMAS W. SPENCE
LAW OFFICE
Degree of Honor Building
325 Cedar Street
St. Paul, Minnesota 55101
(612) 223-8000
Attorney for Respondent Winona Bridge Railway Company

October 7, 1988

APPENDIX A

LISTING PURSUANT TO RULE 28.1

The following list of parent company, subsidiaries (except wholly owned subsidiaries) and affiliates is submitted by petitioners Burlington Northern Railroad Company and Winona Bridge Railway Company pursuant to Rule 28.1 of the Rules of this Court:

1. Winona Bridge Railway Company is a wholly owned subsidiary of Burlington Northern Railroad Company.

2. Burlington Northern Railroad Company is a wholly owned subsidiary of Burlington Northern Inc.

3. The subsidiaries (other than wholly owned subsidiaries) and affiliates of Burlington Northern Inc. and Burlington Northern Railroad Company are:

Burlington Northern Inc.:

Burlington Northern Motor Carriers Inc.

Burlington Resources Inc.

New Mexico and Arizona Land Company
NZ Development Corporation
NZ Properties, Inc.

Plum Creek Timber Company, Inc.
Glacier Park Company
Burlington Environmental Inc.
Chemical Processors, Inc.

The El Paso Company
Meridian Oil Holding Inc.
Meridian Oil Inc.
Butte Pipe Line Company
Portal Pipe Line Company
Portal II Company

CBR Distribution Corporation

National Exchange, Inc.
National Exchange Satellite, Inc.

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago

Camas Prairie Railroad Company

Davenport, Rock Island and North Western Railway Company

The Denver Union Terminal Railway Company

Houston Belt & Terminal Railway Company

Iowa Transfer Railway Company

Kansas City Terminal Railway Company

Keokuk Union Depot Company

Longview Switching Company

M T Properties, Inc.

Paducah & Illinois Railroad Company

Portland Terminal Railroad Company

Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company

No. 88-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

M. M. WINTER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9738
Attorney for Petitioner

October 1988

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

Petitioner, M.M. Winter,[1] files this Reply Brief to address new arguments in the brief of the Interstate Commerce Commission (ICC) and the United States of America (collectively the "Federal Respondents"), hereinafter "USA Br.," and in the brief of Burlington Northern Railroad Company and

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[1]M.M. Winter is General Chairman of the United Transportation Union (UTU) for the Burlington Northern Railroad Company (former Great Northern and SP&S Lines). Contrary to the federal respondents (USA Br. 5), UTU did not separately appear in the ICC's proceedings, nor did UTU do so in the court below.

Winona Bridge Railway Company (collectively "BN"), hereinafter "BN Br."

1. **Jurisdiction of Court of Appeals.** Petitioner has placed major reliance upon *American Farm Lines v. Black Ball*, 397 U.S. 532, 541 (1970), for the rule that the reviewing court and the ICC each have jurisdiction where a petition for judicial review to the Court, and a petition to reopen to the ICC, have been filed with respect to the same agency order; and that the concept of an indivisible jurisdiction which must be all in one tribunal or the other does not fit the statutory scheme. The Government argues that this Court's recent decision in *ICC v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360 (19087) "establishes that the filing of a petition to reopen an agency decision makes that decision nonfinal for purposes of judicial review." (USA Br. 7). The Government reasons that the Court rejected the argument that an ICC order was reviewable despite a pending request for reconsideration, because the Court ruled that the 60-day limitation period (49 U.S.C. 2344) was tolled by the filing of a petition for reconsideration (USA Br. n.10), and that it would be "extremely incongruous" if the same agency order were "final" for purposes of jurisdiction, yet "nonfinal" for purposes of the 60-day limitation period, for there would be no limitations period applicable to a petition for review of an agency order between the date of entry, and the date of a decision by the agency on reconsideration. (Govt. Br. 10, n.11).

The Government next asserts its view that the filing of a petition to reopen plainly renders the order nonfinal is consistent with the settled practice of the courts of appeals. (USA Br. 10-11). Finally, the Government acknowledges *American Farm Lines v. Black Ball*, but says this Court has never held that the same party may simultaneously pursue judicial review and agency reconsideration. (USA Br. 11-12).

The short answer is that this Court nowhere in *ICC v. Brotherhood of Locomotive Engineers* held that a petition to reopen[2] an ICC order renders the agency order nonfinal for purposes of judicial review. Indeed, the exact opposite, for the Court held that the petitions for clarification and for reconsideration in that case did not serve to toll the period for seeking review of the basic trackage rights authorization.[3] The concept of concurrent jurisdiction does not mean an aggrieved party may file for judicial review at a time more than 60 days after a final ICC order, but prior to an ICC decision on reopening. (USA Br. 10, n.11). If one does not seek judicial review within 60 days of the first final order, one must await any subsequent ICC order on reopening.

The answer to the Government's comment, "This Court has never held the same party may simultaneously pursue judicial review and agency reconsideration," (USA Br. 11), is this court's decision in *United States v. Benmar Transp. & Leasing Corp.*, 444 U.S. 4, 5-7 (1979), where the parties successfully sought reconsideration pending judicial review. Moreover, the issue is *jurisdiction* in the reviewing court under 28 U.S.C. 2342(5) and 49 U.S.C. 10327(i) which is involved, not how such jurisdiction should be exercised in deference to ongoing ICC proceedings.

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[2]The Government and BN briefs refer to "reconsideration" as well as "reopen," throughout their texts. The two types of petitions differ. Reconsideration involves an "initial" decision, whereas a petition to reopen is not filed with respect to an initial decision, but involves an agency action subject to judicial review. 49 CFR 1115.3(f). Here, the ICC's January 7, 1988 decision was not an initial decision, but an action by the entire Commission in the first instance. Therefore, petitions to reopen were filed. 49 CFR 1115.2-3(a).

[3]The ICC's decision approving the trackage rights was served October 20, 1982, but the petitioner in that case waited until April 4, 1983 to seek "clarification" (actually reopening).

Contrary to the flurry of citations purporting to show "settled agency practice" that one cannot simultaneously seek judicial review and ICC reconsideration (USA Br. 10-11; BN Br. 7-8), the practice is to the opposite. The only decisions which even arguably agree with the Government's position are *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985) and *ECEE, Inc. v. Federal Energy Regulatory Com'n*, 611 F.2d 554, 557 (5th Cir. 1980). The first is easily distinguished and explained. It involved an order of the Federal Aviation Administraiton, not reviewable under the Hobbs Act (28 U.S.C., 2341-50) as are ICC orders. But more important, the panel's ruling was predicated upon the 1979 amendment to Section 4 of the Federal Rules of Appellate Procedure, sustained in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). 767 F.2d at 1494. Petitions to review ICC orders are not governed by rules governing a notice of appeal from the district court. FRAP 4(a)(4) is separate and independent. *Marrese v. American Academy of Ortho. Surgeons*, 470 U.S. 373, 378-79 (1985).

The language of the court in *ECEE, Inc.* was based upon its misunderstanding of a ruling by the U.S. Court of Appeals for the D.C. Circuit. 611 F.2d at 557. Again, the case did not involve an ICC order or Hobbs Act review.[4] Cf. *Central Power and Light Co. v. United States*, 634 F.2d 137, 152-55 & n. 20 (5th Cir. 1980).

In contrast with the *Aeromar* and *ECEE, Inc.* decisions, the D.C. Circuit and the 11th Circuit have permitted simultaneous judicial review and reopening of ICC orders under the Hobbs Act. See: *Public Service Co. of Indiana, Inc. v.*

[4]The balance of the citations are way off the mark for any guidance. At most, they merely establish that a petition for reconsideration/reopening will toll the limitations of 28 U.S.C. 2344, but do not deal with jurisdiction under 28 U.S.C. 2342(5), 2344.

I.C.C., 749 F.2d 753, 758-60 (D.C. Cir. 1984); *Georgia Public Service Com'n v. United States*, 704 F.2d 538, 540 n.5 (11th Cir. 1983).[5]

2. **Final ICC Order.** The Government and BN argue that the ICC's January 7, 1988 decision was an "initial decision" not subject to judicial review, predicated upon utility or freight rate suspension decisions. (Govt. Br. 13-16; BN Br. 9-12). The rate suspension rulings have a special statutory and historical basis. See: *Aeronautical Radio, Inc. v. F.C.C.*, 642 F.2d 1121, 1234-35 (D.C. Cir. 1980).

The ICC's January 7, 1988 decision was not an "initial decision," *supra*, n.2, 49 CFR 1115.3; 49 U.S.C. 10327(i). Moreover, contrary to BN (BN Br. 4), the ICC had Winona Bridge's response to the petition to reject at the time of the January 7, 1988 decision, and the agency said so in its January 7, 1988 decision. (Pet. 21a).[6] The ICC's grant of trackage rights to Winona Bridge is "operative," and the reliance placed upon injunctive relief granted by another court on other issues (Govt. Br. 7, n.8; BN Br. 4, n.5) is not ground for dismissing the petition for review.

There is nothing in the Staggers Act to suggest that the ICC can place trackage rights agreements into effect immune from prior judicial examination. The Government relies upon language from the Conference Report. (Govt. Br. 13-14).

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[5]The D.C. Circuit opinion may have added significance as it was written by the author of the dissent in *Brotherhood of Locomotive Engineers v. I.C.C.*, 761 F.2d, 714, 726-29 (D.C. Cir. 1985), whose jurisdictional views were largely followed by this Court's majority in *ICC v. Brotherhood of Locomotive Engineers*.

[6]Although Winona Bridge and BN participated in the court below (BN Br. 1, n.1), BN was absent at the ICC. Judge Fagg, dissenting, terms it "farcical" for the ICC to "countenance the charade at hand." 851 F.2d at 1064-65. (Pet. 18a).

However, the statutory language does not suggest such agency power (49 U.S.C. 10505), and the controversial Conference Report was not available to members of Congress prior to consideration of the legislation. See: Eckhardt, Robert C., *Western Coal Traffic League Case*, 13 Transp. L.J. 307, 314-17 (1984).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition for a writ of certiorari, this Court should issue a writ of certiorari.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorney for Petitioner

October, 1988